Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

APRIL TERM, 1995

SEAN JONES, *et al.*,

Petitioners,

v.

REGGIE WHITE, *et al.*,

Respondents;

NATIONAL FOOTBALL LEAGUE, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Federal Rule of Civil Procedure 23(b)(1) permits the certification of a mandatory, non-opt-out settlement class terminating the separate claims of non-named absent class members seeking substantial individual money damages. *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985); *Brown v. Ticor*, 982 F.2d 386 (9th Cir. 1992).

2. Whether the certification of a mandatory, non-opt-out settlement class under Federal Rule of Civil Procedure 23(b)(1) which terminated the separate claims of non-named absent class members seeking substantial individual money damages violated constitutionally protected minimum due process rights. *Shutts*, 472 U.S. 797; *Ticor*, 982 F.2d 386.

3. Whether certain Petitioners' constitutional due process rights were violated by the Eighth Circuit's finding that Petitioners were subject to the jurisdiction of the District of Minnesota, where Petitioners made only a special, limited appearance for the purpose of objecting to the certification of the mandatory class. *Ticor*, 982 F.2d 386; *In re Real Estate Title & Settlement Services Antitrust Litigation*, 869 F.2d 760 (3d Cir. 1989), *cert. denied*, 493 U.S. 821 (1989).

4. Whether in a class action involving substantial individual money damages, a finding that a non-named, absent class member is "subject to the jurisdiction of the court," even if sustainable, is dispositive of that absent class member's right to opt out of the class action settlement under a correct interpretation of Federal Rule of Civil Procedure 23(b)(1). *Shutts*, 472 U.S. 797; *Ticor*, 982 F.2d 386.

5. Whether in a class action involving substantial individual money damages, a finding that a non-named, absent

class member is "subject to the jurisdiction of the court," even if sustainable, is dispositive of that absent class member's constitutional due process right to opt out of the class action settlement. *Shutts*, 472 U.S. 797; *Ticor*, 982 F.2d 386.

6. Whether the Eighth Circuit erred in affirming the order of the Minnesota District Court asserting jurisdiction over putative absent class members even though it failed to observe minimum constitutional due process requirements and to properly apply Federal Rule of Civil Procedure 23 insofar as the Stipulation and Settlement was not fair, adequate and reasonable and the absent, unnamed class members were not adequately represented. *Shutts*, 472 U.S. 797; *In re Federal Skywalk Cases*, 680 F.2d 1175 (8th Cir. 1982); *Ticor*, 982 F.2d 386.

7. Whether the Eighth Circuit erred in affirming the order of the Minnesota District Court which enjoined petitioners from taking any action in any other federal district court where they had pending actions or could bring actions, so as to effectively preclude collateral review of the unlawful, mandatory settlement. *Shutts*, 472 U.S. 797 (1985); *Croyden Assoc. v. Alleco Inc.*, 969 F.2d 675 (8th Cir. 1992), cert. denied sub nom. *Harry and Jeanette Weinberg Foundation Inc. v. Croyden Assoc.*, 113 S.Ct. 1253 (1993); *Ticor*, 982 F.2d 386.

8. Whether the Eighth Circuit erred in affirming the order of the Minnesota District Court which held petitioner Leslie O'Neal in contempt of court because he filed a status report in the Federal District Court for the Central District of California where his individual suit was pending, informing the California Court of the purported mandatory settlement and the Minnesota Court's attempt to preclude collateral review of the unlawful, mandatory settlement. *Shutts*, 472 U.S. 797; *Croyden*, 969 F.2d 675; *Ticor*, 982 F.2d 386.

9. Whether the Minnesota District Court erred in certifying the White class exclusively under Rule 23(b)(1) when the relief sought involved substantial individual money damages which can only be certified under Rule 23(b)(3), rather than certifying the non money damages claims only under Rule 23(b)(1) and the money damages claims under Rule 23(b)(3). *Shutts*, 472 U.S. 797; *Ticor*, 982 F.2d 386.

PARTIES IN THIS PROCEEDING

The petitioners in this proceeding, Sean Jones, Leslie O'Neal, Eric Allen, Cris Dishman, William Mathews, and Van Waiters, are NFL football players and are unnamed, absent class members/objectors/plaintiffs-in-intervention in the purported settlement class approved by the District Court.[1]

Respondents/defendants National Football League ("NFL") are the 28 NFL Football teams and the NFL league office which constitute the NFL, Inc.

Respondents/plaintiffs Reggie White, et al. are the class representatives of the purported settlement class approved by the District Court.

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[1]All petitioners except Van Waiters lack minimum contacts with the District of Minnesota. Mr. Waiters played for the Minnesota Vikings and does not contest traditional, personal jurisdiction based on the minimum contacts doctrine. However, Mr. Waiters does challenge the jurisdiction of the court to impose a mandatory class settlement involving substantial money damages over the objection of an unnamed, absent class member.

TABLE OF CONTENTS

Page(s)

QUESTIONS PRESENTED i

PARTIES IN THIS PROCEEDING iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vii

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 7

JURISDICTION 7

CONSTITUTIONAL PROVISION AND RULE 7

STATEMENT OF THE CASE 7

REASONS FOR GRANTING THE WRIT 9

I. CONTRARY TO THIS COURT'S PRECEDENT IN SHUTTS, THE EIGHTH CIRCUIT RULED THAT CONSTITUTIONAL DUE PROCESS DOES NOT REQUIRE THAT ABSENT CLASS MEMBERS BE GRANTED THE RIGHT TO OPT OUT OF A CLASS ACTION SETTLEMENT INVOLVING SUBSTANTIAL DAMAGE CLAIMS. 9

A. The Eighth Circuit reached the constitutional issue in affirming the approval of the settlement. . . . 11

B. Contrary to the Eighth Circuit's usage, the term "absent" in class action nomenclature means all class members other than the named class representatives. 13

II. CONSTITUTIONAL DUE PROCESS AND THE FEDERAL RULES REQUIRE THAT ABSENT CLASS MEMBERS BE GRANTED THE RIGHT TO OPT OUT OF A CLASS ACTION SETTLEMENT OF SUBSTANTIAL DAMAGE CLAIMS. 17

A. *Hansberry v. Lee* 18

B. *Phillips Petroleum Co. v. Shutts* . . 19

C. *Brown v. Ticor* 20

D. *La Mar v. H & B Novelty & Loan* 21

E. *In Re Greenman Securities Litigation* 23

F. *Keene v. Fiorelli* 24

G. *Reynolds v. NFL* 25

III. THE 8TH AND 9TH CIRCUITS ARE IN DIRECT CONFLICT OVER CERTIFICATION RULES FOR CLASS ACTIONS INVOLVING SUBSTANTIAL MONEY DAMAGES. . . 26

IV. PETITIONERS DID NOT WAIVE THEIR OBJECTIONS TO THE DISTRICT COURT'S ASSERTION OF JURISDICTION OVER THEM. 27

CONCLUSION 30

TABLE OF AUTHORITIES

Page(s)

Cases:

Airline Stewards and Stewardesses Ass'n, Local 550 v. American Airlines, 490 F.2d 636 (7th Cir. 1973) 25

Brown v. Ticor Title Ins. Co.,
982 F.2d 386 (9th Cir. 1992) . . . . . passim

Harry and Jeanette Weinberg Foundation Inc. v. Croyden Assoc.,
113 S.Ct. 1253 (1993) ii

Crowder v. Lash,
687 F.2d 996 (7th Cir. 1982) 26

Croyden Assoc. v. Alleco Inc.,
969 F.2d 675 (8th Cir. 1992) . . . . . ii, 10

Fraley v. Chesapeake and Ohio Railway Co.,
397 F.2d 1 (3d Cir. 1968) 20

Hansberry v. Lee, 311 U.S. 32 (1940) . . . . . passim

In Re Dennis Greenman Securities Litigation,
829 F.2d 1539 (11th Cir. 1987) 23, 24

In re Federal Skywalk Cases,
680 F.2d 1175 (8th Cir. 1982) ii

In re Real Estate Title & Settlement Services Antitrust Litigation,
869 F.2d 760 (3d Cir. 1989) . . . . . i, 10, 21

International Shoe v. State of Washington,
326 U.S. 310 (1945) 27

Johnson v. General Motors Corp.,
598 F.2d 432 (5th Cir. 1979) 26

Keene v. Fiorelli,
14 F.3d 726 (2d Cir. 1993) 24, 25

La Mar v. H & B Novelty & Loan Co.,
489 F.2d 461 (9th Cir. 1973) 21-23

Lone Star Package Car Co. v. Baltimore & O. N. Co.,
212 F.2d 147 (5th Cir. 1954) 20

McNeil v. NFL, 1992-2 Trade Cas. (CCH)
paragraph 69,982 (D. Minn. 1992) 1

Phillips Petroleum Co. v. Shutts,
472 U.S. 797 (1985) . . . . . passim

Reynolds v. NFL,
584 F.2d 280 (8th Cir. 1978) 25-26

Robertson v. National Basketball Association,
556 F.2d 682 (2d Cir. 1977) 25

Ticor Title Ins. Co. v. Brown,
___ U.S. ___, 114 S.Ct. 1359 (1994) 3

United States v. Allegheny - Ludlum Indus., Inc.,
517 F.2d 826 (5th Cir. 1975) 26

White v. NFL,
41 F.3d 402 (8th Cir. 1994) . . . . . passim

White v. NFL,
836 F. Supp. 1509 (D. Minn. 1993) . . . . . passim

Yick Wo v. Hopkins, 118 U.S. 356 (1886) 4

Statutes:

11 U.S.C. § 1126 25

15 U.S.C. §§ 1601-1677 22

28 U.S.C. § 1254(1) 7

F.R.C.P. Rule 23, 28 U.S.C. . . . . passim

United States Constitution, Amendment 5 . . . . . 7, 15, 18-19

United States Constitution, Amendment 14 . . . . 7, 15, 18-19

Kansas Statutes Annotated
Section 60-223 (1983) 19

Other Authorities:

Advisory Committee Note to the 1966 Revision of Rule 23, 39 F.R.D. 69 (1966) 22, 24

Kennedy, *Class Actions: The Right to Opt Out*, 25 Ariz. L. Rev. 3 (1983) 26

Miller and Crump, *Jurisdiction And Choice Of Law In Mandatory Class Actions After Phillips Petroleum Co. v. Shutts*, 96 Yale L.J. 1 (1986) 17

Miller, *An Overview of Federal Class Actions: Past, Present and Future*, 45 Fed. Jud. Center (1977) 18

Newberg on Class Actions (3d ed. 1992) 16, 18

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PETITION FOR A WRIT OF CERTIORARI

Petitioners pray that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Eighth Circuit in *White v. NFL*, No. 93-3375MN, 93-3381MN, 93-3382MN, 93-3403MN, and 93-3415MN, entered December 6, 1994. Petitioners in this proceeding are professional football players asserting substantial antitrust damage claims against the National Football League and its member teams in cases pending in the Federal District Courts for the Central District of California (hereinafter "California actions")[2]

Before Petitioners' cases came to trial, another small group of NFL players tried a consolidated action in the Federal District Court for Minnesota alleging essentially the same antitrust violations and type of damages as petitioners. *McNeil, et al. v. National Football League*, Civ. Nos. 4-87-917, 4-90-476 (D.Minn.). Petitioners and the NFL defendants stipulated to stay the California Actions pending the verdict in Minnesota. This trial resulted in a verdict for the players, with a specific finding of antitrust violations. *McNeil v. NFL*, 1992-2 Trade Cas. (CCH) paragraph 69,982, at 68,769 (D.Minn. 1992)(Special verdict form). Petitioners were preparing to move for the stay to be lifted in Los Angeles so they could proceed with their individual lawsuits when a purported mandatory class action settlement was announced in Minnesota. Petitioners first learned of the mandatory non opt-out settlement when they received notice of a so-called fairness hearing in Minnesota. Petitioners made a

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[2]All petitioners except Cris Dishman and Van Waiters have actions pending. For petitioners Dishman and Waiters, the filing of their actions was stayed by the class action settlement, and their statutes of limitations are tolled.

special appearance in order to challenge the settlement on a number of grounds, but principally because it purported to cut off petitioners' individual rights to seek substantial money damages over their objection. [3]

Despite persuasive and controlling authority stating that both the Federal Rules and the Constitution prohibit the elimination of an individual's right to control separate litigation when substantial money damages are at issue, the District Court certified the mandatory class on the grounds that the benefits to the entire class justified the elimination of individual rights, and because the settlement purportedly was necessary to promote professional football. The District Court certified this class notwithstanding the absence of even one case authorizing such a class under the federal rules, and in contradiction to express United States Supreme Court authority guaranteeing the fundamental right of the individual to control his own lawsuit when money damages are the requested remedy. *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985); *Hansberry v. Lee*, 311 U.S. 32 (1940).

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[3]The mandatory settlement in *White*, compensates some mediocre players well, but pays pennies on the dollar to high end players such as petitioners. The parties negotiating the settlement recognized that the deal was unacceptable for certain players. Players who were separately (as opposed to simply being members of the class) represented by counsel for the class, even those who were not named class members received preferential, side deals and were not forced to take the lesser payments under the mandatory settlement. For example, Marcus Allen would have received at the most $245,000 under the settlement paid out over five years. His separate settlement was $1,876,612. See Appendix ("App.") at pp. 14-15, 232-34.

Petitioners appealed the District Court's order to the Eighth Circuit. Ninth Circuit authority holding that a mandatory class was impermissible under the Constitution when money damages were sought was of course cited to the Court. *Brown v. Ticor*, 982 F.2d 386 (9th Cir. 1992). Furthermore, the serious threat to traditional, non-class action litigation, where the rights of the individual historically have been protected and sacred, if a small group of class members and class counsel race to the courthouse and certify preclusive, mandatory class actions was made clear. This Court's expressed concern about the possible misuse of class actions and the necessary limits to expediency arguments in light of due process considerations was cited. See, *e.g.*, *Ticor Title Ins. Co. v. Brown*, ___ U.S. ___, 114 S.Ct. 1359 (1994)(withdrawing cert.)

Petitioners requested that even if the Eighth Circuit was convinced that traditional litigation and the individual right to chose independent counsel and pursue a separate lawsuit had to be sacrificed to other interests, that the rationale be clearly articulated and the policy choice defined for review by this court. The Eighth Circuit declined this challenge, stating that it did not reach the issue because the District Court had jurisdiction over petitioners. Opinion, App. at p. 14.

Of course, the Eighth Circuit of necessity made the de facto decision that the Federal Rules and the Constitution permit the termination of individual property rights when money damages are in issue, if only a mandatory class action is certified. Valid objections were made to the settlement at every possible level, on the basis that it included substantial money damages and various class members wrongfully were prevented from excluding

themselves from the class.[4] Whether the Eighth Circuit chooses to say so or not, it held that a mandatory class involving substantial individual money damages is permitted by Rule 23 and does not offend the Constitution. This result had to be reached in order to sustain the settlement, even if the Eighth Circuit could not justify or explain the result.[5]

The Eighth Circuit's ruling in *White* not only violates the due process clauses of the Fifth and Fourteenth Amendments of the United States Constitution, it directly conflicts with the holding of the Ninth Circuit Court of Appeal in *Brown v. Ticor*, 982 F.2d 386 (9th Cir. 1992) and with this Court's decision in *Phillips Petroleum v. Shutts*, 472 U.S. 797 (1985).

It is crucial that this Court recognize that this case is not just about professional football. The institutional concerns are enormous, and it is understatement to say that the character of

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[4]The District Court held petitioner, Leslie O'Neal, in contempt for filing a status report in his pending case in federal District Court in Los Angeles. The Court stated that this action violated its injunction of suits in any other forum. See App. pp. 18-25.

[5]The Eighth Circuit opinion, 9 pages long, claimed not to reach the objections set forth in appellants briefs because it found the District Court had jurisdiction over the objectors. Jurisdiction of course does not permit the Court to exceed its authority as set out in the Federal Rules or as circumscribed by the Constitution. Courts have jurisdiction over minority litigants, but the Constitution is supposed to protect certain fundamental rights and restrain even judicial exercise of power. *Yick Wo v. Hopkins*, 118 U.S. 356, 370-74 (1886)(discriminatory application of facially neutral statute violates 14th amendment Equal Protection Clause).

modern, multi-plaintiff litigation is in jeopardy. The Eighth Circuit rule, if permitted to stand, works not only a grievous injustice on Petitioners, but on others similarly situated in all varieties of class action litigation. Quite simply, the future of civil litigation now remains in doubt. The Eighth Circuit rule would not only take away individual property rights which are the bedrock of individual freedom and the democratic heritage in this country, it would encourage the worst possible litigation strategies. If a mandatory class can be certified and sustained over objection and despite pending suits, then the rewards will go to those lawyers who file first in sympathetic jurisdictions. The attorneys who do not move hastily, who consider and carefully evaluate cases, or those who do not feel it is appropriate to activate the class mechanism, will quite simply lose out to the first in line. In fact, as is the case here, individual players who do not seek class certification too may lose their indiviual lawsuits altogether. Furthermore, defendants will be foolish not to encourage the filing of mandatory classes with counsel who are amenable to "reasonable, sweetheart" settlements. Under the Eighth Circuit rule, there is absolutely nothing to check such developments, and indeed they are virtually inevitable.

To deny certiorari here would leave in place an oppressive class action settlement forced on Petitioners over their objection. Certiorari is also necessary to correct an appellate opinion affirming the settlement which claims not to "reach" the federal rules and constitutional issues asserted by Petitioners.

Granting certiorari here will enable this Court to clarify the reach of the due process rights of absent class members recently articulated in *Shutts*, and thereby eliminate a profoundly important uncertainty in the rules of class action litigation. This Court has recently indicated that it is conscious of the importance

of this issue in its opinion withdrawing certification in *Brown v. Ticor* with instructions to the Ninth Circuit to decide the federal rules question before reaching the constitutional question. *Ticor* settled before the issue could be addressed again by the Ninth Circuit. However, class actions are being brought and certified in virtually every district in the country. Certain jurisdictions, such as the Ninth Circuit, have avowed not to abandon traditional, individual constitutional justice in favor of the "representative," albeit undemocratic mechanism of the forced class action advocated by the Eighth Circuit. This Court needs to resolve the conflict among the circuits and define the limits of mandatory class actions which threaten to utterly destroy constitutionally guaranteed property rights held by individual citizens.

The District Court exceeded its authority under the correct and lawful interpretation of the Federal Rules. Further, Petitioners' constitutional due process rights were violated by the denial of their right to opt out, and by the order enjoining prosecution of individual damage actions in other courts. A clear declaration by this Court that Petitioners herein are in fact "absent" class members entitled to the due process projections defined in *Shutts* will restore due process and resolve the existing conflict between the Ninth and Eighth circuits of the federal appellate court system.[6]

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[6]Petitioners also seek review of the Eighth Circuit's affirmance of the District of Minnesota's ruling that Petitioners have waived their objection to jurisdiction by specially appearing to object to the imposition of the mandatory class as well as its obvious unfairness. Petitioners were not adequately represented by class counsel or the class representatives, who negotiated a settlement favorable to themselves by sacrificing the rights of

OPINIONS BELOW

The opinion of the Court of Appeal is reported at 41 F.3d 402 (8th Cir. 1994), and is reprinted in the Appendix at page 2 through 17. The decision of the United States District Court for the District of Minnesota is reported at 836 F.Supp. 1509 (D.Minn. 1993) and is reprinted in the Appendix at pages 26 through 169.

JURISDICTION

The judgment of the Court of Appeals was entered on December 6, 1994. Petitioners timely filed a petition for rehearing, which was denied on January 20, 1995. This Court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. section 1254(1).

CONSTITUTIONAL PROVISION AND RULE

This Petition arises under the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution, and under Federal Rule of Civil Procedure Rule 23, 28 U.S.C.

STATEMENT OF THE CASE

This Petition is necessary due to actions by the United States Court of Appeals for the Eighth Circuit which exceed the authority permitted by the Federal Rules of Civil Procedure and

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absent members. The actions taken in the Eighth Circuit are totalitarian and completely without legal authority of ethical justification. It is this Court's responsibility and duty to grant certiorari and rectify this injustice before it spreads and infects other cases and other causes.

which violate Petitioners' constitutional due process rights. Petitioners are present and former football players in the National Football League who, without due process of law, have been deprived of their right to prosecute individual antitrust damages action against the National Football League and its member football teams. The United States District Court for the District of Minnesota unlawfully certified a mandatory, non-opt-out class action for the settlement of all NFL players' antitrust claims against the league and its teams, which included Petitioners within the certified class against their wills and over their objections to the being included and to the jurisdiction of the district court. The Court approved the settlement of the action over Petitioners' objections, and enjoined Petitioners from further prosecution of individual antitrust damages actions against the league and its teams pending in other jurisdictions. The Eighth Circuit deprived Petitioners of their due process rights by affirming the aforesaid orders of the District of Minnesota.

The Eighth Circuit decided the present case in conflict with this Court's precedent in *Phillips Petroleum v. Shutts*, 472 U.S. 797 (1985), and in conflict with holdings in other circuits, most notably the Ninth Circuit decision in *Brown v. Ticor*, 982 F.2d 386 (1992). The Eighth Circuit holding introduces uncertainty into the law on the question as to whether constitutional due process requires that un-named, absent plaintiffs be given the right to opt out of a class action settlement foreclosing substantial money damage claims. Review by this Court is necessary to clarify this important issue of construction of Rule 23 and constitutional law.

REASONS FOR GRANTING THE WRIT

I. CONTRARY TO THIS COURT'S PRECEDENT IN SHUTTS, THE EIGHTH CIRCUIT RULED THAT CONSTITUTIONAL DUE PROCESS DOES NOT REQUIRE THAT ABSENT CLASS MEMBERS BE GRANTED THE RIGHT TO OPT OUT OF A CLASS ACTION SETTLEMENT INVOLVING SUBSTANTIAL DAMAGE CLAIMS.

The Eighth Circuit in this case acknowledged Petitioners' contention that "the district court erred in failing to apply the standard set forth by the Supreme Court in *Phillips Petroleum Co. v. Shutts*, which required that 'an absent plaintiff be provided with an opportunity to remove himself from the class by'" opting out, "at least in cases seeking primarily monetary damages." 472 U.S. 797, 811-12 (1985)." Op., App. at p. 12. The Eighth Circuit Opinion conceded that *Shutts* does require opt out rights at least in actions seeking primarily monetary damages. Id.

Inexplicably, the Opinion then misinterprets and eviscerates the holding of *Shutts* suggesting that it applies exclusively to class members who are "absent" solely in the sense of not having minimum contacts with the state. The Eighth Circuit makes an utterly illogical and non-sensical change in the definition of "absent" class member and a distinction without any rational or justifiable difference between absent non-named class members who happen to be state residents and those who are absent non-named class members residing out of state. Once the constitutional concerns of *Shutts* are limited to only out of state absent non-named class members who do not have minimum contacts with the forum, the Eighth Circuit found that petitioners

subjected themselves to jurisdiction by asserting their objections, thereby giving up completely their constitutional right to dispute involuntary inclusion in the class which they had no participation in or control over. To the Eighth Circuit, whatever the reality of the powerlessness and absence of the non-named class member, the fiction will be that jurisdiction is the equivalence of "presence" in the class so as to satisfy due process. "In the present case, however, there exists no absent plaintiff whose due process rights must be protected in this fashion. Rather, each of the objectors was subject to the jurisdiction of the district court." Op., App. at p. 12.

This creative fiction of the Eighth Circuit is purely an end oriented attempt to reach a desired result, without a proper concern for the civil justice system or the development of jurisprudence. No case, law review article, or commentary of any kind which discusses the theory of class actions and their application pro and con, has ever suggested that non-named class members are anything other than "absent." That fact about representative as contrasted with individual actions raises the constitutional dilemma. The issue is whether due process will permit self selected class "representatives" and class counsel to make decisions and overrule the choice of the individual class members. By definition, non-named class members have no standing and no right to even appear before the court in a class action. See, e.g., *Croyden Associates v. Alleco, Inc.*, 969 F.2d 675, 677-80 (8th Cir. 1992). Absent class members do not even know about the action until a notice is served; and with a settlement class, notice only is served after all is virtually over, as was the case here. See generally, *In re Real Estate, etc.*, 869 F.2d 760 (3d Cir. 1989). It is small comfort to non-named class members that the Eighth Circuit has repealed the laws of logic,

and informed them that they were not truly "absent" in the class action, even though they had no voice and no right or ability to participate.[7]

A. The Eighth Circuit reached the constitutional issue in affirming the approval of the settlement.

Despite the Court's pretense of not reaching the due process and Rule 23 issue raised by Petitioners, the act of affirming "the approval of the settlement agreement by the district court," Op. at 8, required that the Eighth Circuit decide this issue. The district court approved a settlement agreement which did certify a non-opt-out plaintiff class. In affirming the district court, the Eighth Circuit placed its imprimatur upon the

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[7]To illustrate the impossibility of any meaningful participation, this Court need only examine the District Court's order granting petitioners motions to intervene, solely for the right to appeal, not to litigate. The Order states:

Based on the court's determination that the overall agreement is fair, reasonable and adequate to the class, the court denies all motions to intervene except to the extent that the movants, other than Mr. Sheridan and the Tice plaintiffs, shall be permitted to intervene as "intervenor-objectors" solely for purposes of preserving their rights to appeal any judgment entered by the court in connection with the Stipulation and Settlement Agreement." App. at p. 285 (footnotes omitted). Further, petitioner Van Waiters never asserted a lack of minimum contacts as he plays for the Vikings. However, there was not one scintilla of difference between his absence from the class and the out of state players. None of them had any right or ability to participate, and in the commonly understood, universal language of class action jurisprudence and scholars, "absent," heretofore, has meant a non-named class member wherever they happen to reside.

certification of such a class.

Neither Rule 23 nor any case authority permits non-opt-out classes based on presence within the state or territorial jurisdiction of the federal court. No case, comment, law review article or practice guide discusses limits on class membership in terms of personal jurisdiction. In practice, no court asks about or notifies absent class members that substantive rights depend on physical location and contact with the jurisdiction in question.

The issue of personal jurisdiction, as opposed to "jurisdiction" in the ultra vires sense, decides only one small preliminary issue for some Petitioners herein. All Petitioners, including those playing for the Minnesota Vikings, raised the more significant legal error that neither Rule 23 nor the Constitution permit a mandatory class certification when substantial money damages are involved. The issue raised in common by all objectors is whether the district judge exceeded the power set forth in the federal rules and acted in a manner consistent with constitutional due process rights by enjoining proceedings in actions other than the one then before the court, in sole reliance on the objectors' involuntary status as mandatory class members.

The Opinion creates an entirely new Eighth Circuit rule with a definition of "absent" that has no precedent in case law or class action jurisprudence. Applied to *Shutts* and to Rule 23 federal class actions, state residents who are non-named class members are subject to an involuntary confiscation of their individual civil claims, while out of state, non-named class members maintain the right to control their individual actions (so long as they do not object). Nothing in *Shutts* or any other case suggests such a distinction or proffers any rationale for such a rule.

B. Contrary to the Eighth Circuit's usage, the term "absent" in class action nomenclature means all class members other than the named class representatives.

It is basic that "absent" class members are all those who are not named plaintiffs in the class suit. All other class members are absent in the sense that they lack any standing before the court and cannot participate in any way in the litigation or negotiation leading up to a settlement. These absent class members, as was the case here, are only informed of any activity after a settlement has been consummated and conditionally approved by the court. It makes not one whit of difference to the constitutional and jurisprudential issues whether the un-named class member has minimum contacts with the jurisdiction or not. Those having such contacts have absolutely no say and the due process concern is equal to that of an out of state objector.

Rule 23 makes no state line distinctions. Rule 23 essentially provides for mandatory class certification in injunctive actions, and non-mandatory class certification where damages are involved. The Comments to Rule 23 do not mention classes structured differently based on contacts with the forum court. This is hardly surprising since such a distinction would ignore the practical realities of class actions. The class representatives in a Rule 23(b)(2) class are the only members with standing to appear before the court or contact class counsel. The absent members are not before the court, and this is true whether the member is physically located in the jurisdiction or not.

Shutts does not define "absent" to mean residing out of state or lacking minimum contacts, but merely absent from court in the sense that the class member is not one of the "named" class representatives. The "absent" class members included residents of all 50 states. 472 U.S. at 799. The existence of Kansas

residents among the absent class members was specifically acknowledged. Id. at 801. If the right to opt out depended on residing out of state (or on lack of minimum contacts) the Court would have needed to articulate a different set of standards for Kansas residents (or for class members who lack minimum contacts). But the *Shutts* Court did not draw any distinction based on residence. It held that a court did have jurisdiction to certify a national class, but that due process required an opt-out. Id. at 811-12. All the *Shutts* class members, in-state and out, had been given the right to .opt out and therefore, the class did not transgress constitutional projections. Id.

The right to opt out recognized in *Shutts* does not depend on whether the objectors are within the jurisdiction of the Court. The right to opt out derives from the fundamental nature of the class action device itself which permits representative suits to be brought on behalf of non-participants in extremely limited circumstances. If the participants do not approve the procedural class mechanism, they have a right to opt out and pursue their individual actions, if the controversy involves money damages.

Shutts generally uses the term "absent" in contrast with the term "named", and the two categories exhaust the field of meaningful "class" nomenclature. *Shutts* did not create any third category to describe class members neither named nor absent, such as "unnamed resident". For example, the *Shutts* Court observes that "[a] plaintiff class in Kansas and numerous other jurisdictions cannot first be certified unless the judge, with the aid of the named plaintiffs and defendant, conducts an inquiry into the common nature of the named plaintiffs' and the absent plaintiffs' claims...." Id. at 809.

The Court further states that due process "requires that the named plaintiff at all times adequately represent the interests

of the absent class members." Id. at 812. Also, in recognizing that the "absent" plaintiffs whose claims may be adjudicated in a class action "may not" have minimum contacts, *Shutts* does not treat "absent" plaintiffs and resident plaintiffs as mutually exclusive. Id. at 811. The Court does consider whether non-resident absent members must have special protections because of their location outside the state, and eventually concludes that because due process requires an opt-out for all absent class members, that provision will satisfy due process concerns for the entire universe.

The use of the term "absent" in the class action context originates from *Hansberry v. Lee*, 311 U.S. 32 (1940). The sole purpose for which *Hansberry* uses the term "absent" is to distinguish between class members present in court and those who are not. Id. at 42-43. There was no territorial jurisdiction issue even implicit in *Hansberry*, which was an Illinois state court case alleging housing discrimination against a putative class of residents of an area within the city of Chicago. Id. at 37-39.

The word "absent" is used four times in the *Hansberry* opinion, each time clearly referring to such putative class members who are not "present" as parties to the litigation. In the first instance, the Court recites the general rule that "one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process ... and judicial action enforcing it against the person or property of the absent party is not that due process which the Fifth and Fourteenth Amendments requires." Id. at 40-41. Next, the Court referred to class actions as an exception to the general rule, stating that "members of a class not present as parties to the litigation may be bound by the judgment where ... the relationship between the parties present and those

who are absent is such as legally to entitle the former to stand in judgment for the latter." Id. at 42-43. The two further references to the word "absent" occur in the process of applying the above rules to the facts of the case. Id. at 43-44. A leading class action treatise has an entire chapter entitled "Absent Class Members." Newberg on Class Actions (3d ed. 1992), Chapter 16. The chapter does not discuss territorial jurisdiction or minimum contacts. There is no suggestion in Newberg that the word "absent" has anything to do with geographical boundaries or minimum contacts. There is no precedent for the novel definition of an absent class member created by this Court. The court's use of this incorrect definition of absent class member obviously resulted in an erroneous application of the applicable law.

The Eighth Circuit's determination here that Petitioners "submitted to jurisdiction," besides being erroneous, also does not resolve the issue of whether Rule 23 and the Constitution permit mandatory classes over the objection of non-named absent class members. Given that the Eighth Circuit found Petitioners within its jurisdiction, it was required to, and in fact necessarily did, decide that the Petitioners were not entitled to the opt-out right recognized in *Shutts*. The jurisdictional question may be a first step, but it is only that. In fact, not all Petitioners contested "personal jurisdiction" in terms of minimum contacts, but all objected that the district court did not have the "jurisdiction" in terms of power to impose an involuntary, cram-down class when money damages are involved.

In their Petition for Rehearing, the Petitioners here invited the Eighth Circuit to acknowledge that it did decide the constitutional and Rule 23 issues. Petitioners tried to give the Court an opportunity to offer its rationale for such a rule, to

permit review of the conflicting holdings of the Eighth and Ninth Circuits on the subject with the philosophical and practical considerations set forth. Petn. for Rehrg. 5. In denying the Petition for Rehearing, App. at p. 1, the Eighth Circuit adopted its rule de facto, with no justification or explanation. Given the Eighth Circuit's erroneous and unjust interpretation of the due process clause, and its inability to set forth a cogent rationale for its aberrant reading of class action precedent, this Court should grant certiorari to dispel the uncertainty resulting from the Eighth Circuit's extrordinary new rule.

II. CONSTITUTIONAL DUE PROCESS AND THE FEDERAL RULES REQUIRE THAT ABSENT CLASS MEMBERS BE GRANTED THE RIGHT TO OPT OUT OF A CLASS ACTION SETTLEMENT OF SUBSTANTIAL DAMAGE CLAIMS.

The proper and constitutional use of class suit devices has been the subject of controversy and debate since the concept was originally devised.[8] On the one hand, it is a well-recognized fundamental principle of American jurisprudence that an individual has a right to direct representation and control of legal proceedings which may affect his or her life, liberty, or property. On the other hand, where numerous individuals share largely identical interests, concern for efficiency and expeditious use of judicial resources may support the use of alternatives to traditional case-by-case litigation. Although some commentators, courts, and self-interested litigants, impatient with the sluggishness of old-

---

[8]See, for example, Miller and Crump, *Jurisdiction And Choice Of Law In Mandatory Class Actions After Phillips Petroleum Co. v. Shutts*, 96 Yale L.J. 1 (1986).

fashioned constitutionalstyle justice, favor a subordination of concern for individual fairness and due process to the stated goal of efficiency,[9] the majority of courts, including the this Court, have not relaxed due process requirements in this context.

A. *Hansberry v. Lee*

As early as 1940, the Supreme Court recognized the attraction of the "class suit" in efficiency terms and also its dangers. For example, in the well-known case of *Hansberry v. Lee*, 311 U.S. 32 (1940), the Court held that the res judicata or mandatory effect of a purported class suit involving a restrictive property agreement violated plaintiffs' due process rights.

> It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process . . . . A judgment rendered in such circumstances is not entitled to the full faith and credit which the Constitution . . . prescribe[s] . . . and judicial action enforcing it against the person or property of the absent party is not that due process which the Fifth and Fourteenth

---

[9]For example, in evaluating the use of Rule 23 in the mass tort context, Professor Newberg has stated: "The economies of time, effort, and expense of the class device cut across categorical tort lines and ought not to be obscured by the narrow application of circumstances or by undue emphasis on traditional interests in one-to-one litigation." 3 *Newberg Class Actions*, §§ 17.06 (3d ed. 1992); see also Miller, *An Overview of Federal Class Actions: Past, Present and Future*, 45 Fed. Jud. Center (1977).

Amendments requires [sic].

> To these general rules there is a recognized exception that, to an extent not precisely defined by judicial opinion, the judgment in a "class" or "representative" suit, to which some members of the class are parties, may bind members of the class or those represented who were not made parties to it . . .
>
> It is evident that the considerations which may induce a court thus to proceed, despite a technical defect of the parties, may differ from those which must be taken into account in determining whether the absent parties are bound by the decree or..... in ascertaining whether such an adjudication satisfies the requirements of due process and of full faith and credit.

Hansberry, 311 U.S. at 40-42 (citations omitted).

B. *Phillips Petroleum Co. v. Shutts*

This Court's most recent and important pronouncement regarding due process constraints on class actions is found in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). *Shutts* involved a class action suit against a gas company for money damages from delayed interest payments to leaseholders. The leaseholders resided in each of the 50 states, the District of Columbia, and several foreign countries.

In approving class certification under Kansas Statutes Annotated Section 60-223 (1983), similar to Rule 23(b)(3) of the Federal Rules of Civil Procedure, the *Shutts* Court made it clear that due process concerns cannot be sacrificed to the pressures of immediate efficiency.

> If the forum State wishes to bind an absent

> plaintiff concerning a claim for money damages or similar relief at law, it must provide minimal procedural due process protection. The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel . . . . The notice should describe the action and the plaintiffs' rights in it. Additionally, we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the court. Finally, the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members.[10]

Shutts, 472 U.S. at 812 (citations omitted).

C. *Brown v. Ticor*

In *Brown v. Ticor Title insurance Co.*, 982 F.2d 386 (9th Cir. 1992), cert. granted Oct. 4, 1993, cert. withdrawn April 4, 1994, the Ninth Circuit considered due process requirements for Rule 23 settlement classes post-*Shutts* in an antitrust context. Several title insurance holders had brought numerous antitrust

---

[10]While *Shutts* dealt with class actions under a Kansas statute, it was modeled on the federal rule. Additionally, it is well settled that due process concerns apply not only to federal courts exercising diversity jurisdiction but also where cases are brought under federal statutes. See *Fraley v. Chesapeake and Ohio Railway Co.*, 397 F.2d 1 (3d Cir. 1968); *Lone Star Package Car Co. v. Baltimore & O. N. Co.*, 212 F.2d 147 (5th Cir. 1954).

actions, in various locations, claiming price fixing agreements among defendants Ticor and other title insurance companies. The litigation was consolidated by the MDL panel in federal court in Pennsylvania where eventually a non-opt-out class was certified pursuant to Rule 23(b)(1) and (b)(2). After certification, a settlement was reached. The Pennsylvania District Court granted preliminary approval of the "non-opt-out" settlement, and the Attorney General of Arizona and others filed separate suits in Arizona. Defendants moved for summary judgment on res judicata grounds in Arizona because the class certification violated due process requirements as set forth in *Shutts*. The court held that:

> In order to bind an absent plaintiff concerning a claim for monetary damages, the court must provide minimal due process. . . . . The Third Circuit held that the MDL 633 litigation was a "hybrid suit that involved the foreclosure of substantial damage claims." *In Re Real Estate*, 869 F.2d 760, 768. We follow the Third Circuit's holding.
>
> According to *Shutts*, minimal due process requires that "an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court," if monetary claims are involved. 472 U.S. at 812, 105 S.Ct. at 2974.

Ticor, 982 F.2d at 392 (some citations omitted).

D. *La Mar v. H & B Novelty & Loan*

The pre-*Shutts* case of *La Mar v. H & B Novelty & Loan Co.*, 489 F.2d 461 (9th Cir. 1973), set forth the due process

concerns raised by a free-wheeling use of Rule 23, foreshadowing the language of the Supreme Court in *Shutts*. In *La Mar*, plaintiff sued all pawnbrokers in Oregon on behalf of all customers of pawnbrokers claiming violations of the Truth-in-Lending Act, 15 U.S.C. Sections 1601-1677. The district court certified a plaintiffs' class under Rule 23. In reversing the class certification, the Ninth Circuit highlighted the due process problems of Rule 23.

> The [Advisory Committee's] discussion of Rule 23(b)(3) emphasizes the importance of an application that achieves "economies of time, effort, and expense, and promote[s] uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." 39 F.R.D. 69, 102-103 (1966).

La Mar, 489 F.2d at 465 n.2. "The tone of. . . . [the Committee] note [to Rule 23] is one of prudence and caution." 489 F.2d at 465. The court went on to analyze proper use of Rule 23(b)(1) versus Rule 23(b)(3) class certification.

> Rule 23(b)(1)(A) authorizes class actions to eliminate the possibility of adjudications in which the defendant will be required to follow inconsistent courses of continuing conduct. This danger exists in those situations in which the defendant by reason of the legal relations involved can not as a practical matter pursue two different courses of conduct. The Advisory Committee's Note makes this clear in discussing Rule 23(b)(1)(A) by its reference to actions to declare bond issues invalid, to fix the rights and

> duties of a riparian owner, and to determine a landowner's rights and duties respecting a claimed nuisance.
>
> Infrequently, if ever, will this be the case when the action is for money damages.

La Mar, 489 F.2d at 466.

E. *In Re Greenman Securities Litigation*

The Eleventh Circuit in a post-*Shutts* case involving complex securities issues, *In Re Dennis Greenman Securities Litigation*, 829 F.2d 1539 (11th Cir. 1987), considered the issue of mandatory class certification. *Greenman* involved allegations of fraud, violations of various securities acts, and R.I.C.O. counts against Greenman, a broker, Merrill Lynch, Paine Webber, and Barclay. A number of investors filed suit. The individual suits were enjoined and a class action was certified under 23(b)(1). Id. at 1541. After reviewing the district court's finding, the Eleventh Circuit reversed the 23(b)(1) certification, expressly commenting on the due process concerns:

> Members of a (b)(3) class, but not those of a (b)(1) class, may choose to opt out and not be bound by the judgment. ... These practical differences affect the ability of plaintiffs to bring class actions as well as their attractiveness to defendants. Applying the various subsections of Rule 23(b) requires a balance between an individual's due process rights and the judiciary's need to expedite the orderly resolution of conflict. ...
>
> The identity of judicial action that creates "inconsistent or varying adjudications" [under Rule 23(b)(1)] is not clear. Many courts

> confronting the issue have held that Rule 23(b)(1)(A) does not apply to actions seeking compensatory damages. ... Underlying is the concern that if compensatory damage actions can be certified under Rule 23(b)(1)(A), then all actions could be certified under the section, thereby making the other sub-sections of Rule 23 meaningless, particularly Rule 23(b)(3). ...
>
> [T]he Advisory Committee Notes support the proposition that (b)(1)(A) certification is for cases seeking injunctive and declaratory relief. ... Advisory Committee Note to the 1966 Revision of Rule 23, 39 F.R.D. 69, 100 (1966). Since the plaintiffs sought compensatory damages, the district court erred by certifying the class pursuant to (b)(1)(A).

Greenman, 829 F.2d at 1544-45 (some citations omitted).

F. *Keene v. Fiorelli*

Recently, the Second Circuit in *Keene v. Fiorelli*, 14 F.3d 726 (2d Cir. 1993), vacated Judge Weinstein's order issuing a preliminary injunction and certifying a mandatory limited-fund class under 23(b)(1)(B). Keene sought a mandatory settlement of all claims by present or future asbestos claimants and alleged it was a limited fund. Although the court based its ruling on Article III grounds, it commented on the risks of mandatory class settlements.

> [C]lass members in cases such as this would have no say in the conduct of the court-appointed class representatives and, unlike creditors in bankruptcy, are not able to vote on a settlement. See 11 U.S.C. § 1126. For them, it would be

> "cram-down" from start to finish. Finally, unlike a lawyer for a creditors' committee, the class representatives in matters like the present one may not be compensated unless a settlement is reached, a situation fraught with danger to the rights of plaintiffs.

Keene, 14 F.3d at 732.

G. *Reynolds v. NFL*

There have been a few court's that have certified without serious explanation or justification mandatory classes where some money damages relief was sought. This was a pre-*Shutts* hallmark of cases involving sports. For example, in *Reynolds v. NFL*, 584 F.2d 280 (8th Cir. 1978), the Eighth Circuit approved certification of the *Alexander* 23(b)(1) class rather than a 23(b)(3) class, principally citing *Robertson v. National Basketball Association*, 556 F.2d 682 (2d Cir. 1977). Even before *Shutts*, *Reynolds* was criticized for its implicit assumption that athletes (as contrasted with airline stewards, for example) did not have individual due process rights. Cf. *Airline Stewards and Stewardesses Ass'n, Local 550 v. American Airlines*, 490 F.2d 636 (7th Cir. 1973), cert. denied, 416 U.S. 993 (1974), with *Reynolds v. National Football League*, 584 F.2d 280 (8th Cir. 1978). As one commentator stated:

> [I]n *Reynolds v. National Football League*, the appellate court rationalized that the antitrust suit seeking injunctive and monetary relief had properly been certified as a (b)(1) or (b)(2) class suit. Therefore, the retired football players had no absolute power to opt out and were bound by a monetary settlement of their antitrust claims, when their appellate attack on

> the adequacy of representation and fairness of the settlement failed. There is good reason to question the *National Football League* result. Granting that the restructuring of the league required a mandatory settlement as to the future, thus overriding the absolute right of an individual player or player group not to be bound, nevertheless, the settlement of individual past damages claims should have been subject to Rule 23(b)(3), allowing individuals, particularly retired players, to opt out. This was a proper case for bifurcating the issues between Rule 23(b)(1)-(2) and (b)(3) . . . .

Kennedy, *Class Actions: The Right to Opt Out*, 25 Ariz. L. Rev. 3, 60-61 (1983). See also *United States v. Allegheny - Ludlum Indus., Inc.*, 517 F.2d 826 (5th Cir. 1975); *Johnson v. General Motors Corp.*, 598 F.2d 432 (5th Cir. 1979); *Crowder v. Lash*, 687 F.2d 996 (7th Cir. 1982).

III. THE 8TH AND 9TH CIRCUITS ARE IN DIRECT CONFLICT OVER CERTIFICATION RULES FOR CLASS ACTIONS INVOLVING SUBSTANTIAL MONEY DAMAGES.

The district court in this case took pains to try to limit the consequences of its decision to these football players. However, in view of the Eighth Circuit Opinion, a direct conflict now exists between the present case and the holding of the Ninth Circuit in *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992), on the permissibility of a non opt-out class where substantial money damages are involved. In contrast to the Eighth Circuit's affirmance of a non opt-out class in an action seeking substantial

damages, the Ninth Circuit in *Ticor* held that an absent, non-named plaintiff has a constitutional due process right to opt out of a class settlement involving "foreclosure of substantial damage claims." Id. at 392..

As in *Shutts*, the right to opt-out of the damages settlement in *Ticor* did not depend on whether the objectors had submitted to the personal jurisdiction of the class action court. Territorial jurisdiction was irrelevant in *Ticor*, as twelve class actions were consolidated in the Pennsylvania district court by the Multidistrict Litigation Panel. Id. at 380. The Court uses the term "absent plaintiff" to refer to class members other than those represented by the class counsel in the MDL proceedings. Id. at 392. Thus, in affirming the certification of a non opt-out class settlement of substantial damage claims, this Court's opinion in the present case stands in direct conflict with the holding in *Ticor*.

IV. PETITIONERS DID NOT WAIVE THEIR OBJECTIONS TO THE DISTRICT COURT'S ASSERTION OF JURISDICTION OVER THEM.

Taken together, the decisions in *International Shoe v. State of Washington*, 326 U.S. 310 (1945), *Hansberry v. Lee*, 311 U.S. 32 (1940), and *Phillips Petroleum v. Shutts*, 472 U.S. 797 (1985), define the two bases under which a court may exercise personal jurisdiction over unnamed class members. The first is when the class member has minimum contacts with the forum. *International Shoe*, 326 U.S. at 319. The second is when, under *Shutts*, the class member is given the opportunity to opt out and is provided with adequate representation by the class representatives. *Shutts*, 472 U.S. at 810. It is clear from *Shutts* that the absence of either the opportunity to opt out or adequate representation deprives the court of in personam jurisdiction over

absent class members. Consequently, in objecting to jurisdiction Petitioners here could and did properly argue in the context of this class action that they did not have minimum contacts with the forum, that the absence of the right to opt out denied them their due process rights, and that the representation of the class representatives and class counsel was inadequate. All of the arguments presented by Petitioners and claimed by the NFL and named plaintiffs to be "to the merits" were clearly addressed to the adequacy of representation issue. Since the absence of adequate representation defeats jurisdiction, to hold that discussion of matters touching upon the adequacy of representation constitutes waiver of any objections to jurisdiction makes no sense whatsoever, and there accordingly is no sound basis for asserting that Petitioners herein ever waived their objections to the District Court's assertion of in personam jurisdiction over them.[11] Id.

Petitioners have carefully confined themselves to arguing jurisdictional issues. As recognized in *Shutts*, adequate representation of the interests of absent class members is required "[i]f the forum State wishes to bind an absent plaintiff concerning a claim for money damages...." Id. at 812. Thus, adequate

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[11]Similarly, Mr. O'Neal's appearance to show cause why he should not be held in contempt cannot properly be deemed acceptance of the jurisdiction of the court and waiver of all jurisdictional objections. It would be grossly unfair to require Mr. O'Neal to choose between the waiver of his objections to the District Court's jurisdiction and properly defending himself against the charge that he has acted in disregard of the Court's authority and dignity. It is exactly because of his respect for that court and the judicial process that he has taken all of his actions, including his special appearance in connection with the contempt proceedings.

representation is not merely a prerequisite for settlement approval, but also to the court's exercise of personal jurisdiction over otherwise absent class members.

Particularly in a class action filed for the sole purpose of securing judicial approval of a settlement already reached, as here, it is wholly illogical to assert that pointing out the special treatment of named plaintiffs under the settlement and their failure to fairly treat absent members' rights waives jurisdictional objections. In contrast to a case that will be litigated, where the proposed settlement has been substantively concluded before the court is asked to certify the class, the adequacy of representation issue can only be evaluated by reference to the proffered settlement. If otherwise absent class members were unable to bring to the attention of the court the specially favorable treatment the named plaintiffs have negotiated for themselves alone, there would exist no party to the proceedings motivated to disclose the failure of adequate representation implicit in such favoritism.

In *Shutts* this Court spelled out the prerequisites that must be met before a court may assert jurisdiction over an absent plaintiff in a class action seeking to resolve substantial money damages claims. In addition to the right to opt out, these include an opportunity to present objections and challenge the adequacy of the representation. Raising these objections cannot under an equitable system result in the "Catch 22," that an absent class members rights are thereby voided. Such a rule is unworthy of this Court or the constitutional justice system. Concerns for uninterrupted Monday night football may or may not be serious, but they do not excuse the dismantling of constitutional protections of individual rights that most scholars have long understood to be inviolate.

CONCLUSION

Petitioners have a constitutional right to opt out of any plaintiff class certified for money damages and a correct interpretation of Rule 23 precludes certification of a mandatory class in such circumstances. Accordingly, they seek a Writ of Certiorari for review of the Eighth Circuit's Opinion and holding in this case which should be granted. Denying certiorari would leave in place a grievous injustice and an aberrant rule of law that introduces uncertainty and inequity into the important field of class action damages litigation.

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

State of California

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County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 9105 Sunset Boulevard, West Hollywood, California 90069; that on April 18, 1995, I served the within *Petition For Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on April 18, 1995, Los Angeles, California.

_____

Betty J. Malloy
(*Original Signed*)

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. _____

IN THE
Supreme Court of the United States
APRIL TERM, 1995

SEAN JONES, *et al.*,

Petitioners,

v.

REGGIE WHITE, *et al.*,

Respondents;

NATIONAL FOOTBALL LEAGUE, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

APPENDIX FOR PETITION FOR WRIT OF CERTIORARI
VOLUME I OF IV

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TABLE OF CONTENTS

Byron Evans, et al. v. National Football League, et al.
(Nos. 93-/3375/3381/3382/3403/3415MNMI)
United States Court of Appeals for the Eighth Circuit (January 20, 1995) Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc 1

Reggie White, et al. v. National Football League, et al.
(Nos. 93-3375, 93-3381, 93-3382, 93-3403, 93-3415)
United States Court of Appeals for the Eighth Circuit (December 6, 1994) Opinion of the Court 2

Reggie White, et al. v. National Football League, et al.
Civ. No. 4-92-906, United States District Court for the District of Minnesota (August 20, 1993) Order 18

Reggie White, et al. v. National Football League, et al.
Civ. No. 4-92-906, United States District Court for the District of Minnesota (August 20, 1993) Final Consent Judgment 26

Reggie White, et al. v. National Football League, et al.
Civ. No. 4-92-906, United States District Court for the District of Minnesota (August 19, 1993) Order 34

Reggie White, et al. v. National Football League, et al.
Civ. No. 4-92-906, United States District Court for the District of Minnesota (April 30, 1993) Order 170

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-/3375/3381/3382/3403/3415MNMI		
Byron Evans, et al,	*	
	*	
Appellants,	*	Order Denying
	*	Petition for
v.	*	Rehearing and
	*	Suggestion for
National Football League, et al,	*	Rehearing En Banc
	*	
Appellees.	*	
	*	

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Loken took no part in the consideration or decision of these cases.

January 20, 1995

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

Reggie WHITE; Michael Buck; Hardy Nickerson; Vann McElroy; Dave Duerson,

Plaintiffs-Appellees,

Byron Evans, Objector-Appellant,

v.

NATIONAL FOOTBALL LEAGUE; The Five Smiths Inc.; Buffalo Bills, Inc.;

Chicago Bears Football Club, Inc.; Cincinnati Bengals, Inc.; Cleveland

Browns, Inc.; The Dallas Cowboys Football Club, Ltd.; PDB Sports, Ltd.; The

Detroit Lions, Inc.; The Green Bay Packers, Inc.; Houston Oilers, Inc.;

Indianapolis Colts, Inc.; Kansas City Chiefs Football Club, Inc.; The Los

Angeles Raiders, Ltd.; Los Angeles Rams Football Company, Inc.; Miami

Dolphins, Ltd.; Minnesota Vikings Football Club, Inc.; KMS Patriots, L.P.;

The New Orleans Saints Limited Partnership; New York Football Giants, Inc.;

New York Jets Football Club, Inc.,

Defendants-Appellees,

The Philadelphia Eagles Football Club, Inc.,

Defendant,

B & B Holdings, Inc.; Pittsburgh Steelers Sports, Inc.; The Chargers

Football; The San Francisco Forty-Niners, Ltd.;

Seattle Seahawks, Inc.;

Tampa Bay Area NFL Football Club, Inc.; Pro-Football, Inc., Defendants-

Appellees.

Reggie White; Michael Buck; Hardy Nickerson; Vann McElroy; Dave

Duerson, Plaintiffs-Appellees,

Sean JONES; Ken Norton, Jr.; Eric Allen; Patrick Hunter; William C.

Matthews; Leslie O'Neal; Eric Sanders; Chris Dishman; Lomas Brown; Neil

Smith; Van Waiters; Broderick Thompson; Curtis Duncan; Jerry Ball,

Intervenors-Appellants,

v.

NATIONAL FOOTBALL LEAGUE; The Five Smiths, Inc.; Buffalo Bills, Inc.;

Chicago Bears Football Club, Inc.; Cincinnati Bengals, Inc.; Cleveland

Browns, Inc.; The Dallas Cowboys Football Club, Ltd.; PDB Sports, Ltd.; The

Detroit Lions, Inc.; The Green Bay Packers, Inc.; Houston Oilers, Inc.;

Indianapolis Colts, Inc.; Kansas City Chiefs Football Club, Inc.; The Los

Angeles Raiders, Ltd.; Los Angeles Rams Football Company, Inc.; Miami

Dolphins, Ltd.; Minnesota Vikings Football Club,

Inc.; KMS Patriots, L.P.;
The New Orleans Saints Limited Partnership; New York Football Giants, Inc.;
New York Jets Football Club, Inc.,
Defendants-Appellees,
The Philadelphia Eagles Football Club, Inc.,
Defendant,
B & B Holdings, Inc.; Pittsburgh Steelers Sports, Inc.; The Chargers
Football; The San Francisco Forty-Niners, Ltd.; Seattle Seahawks, Inc.;
Tampa Bay Area NFL Football Club, Inc.; Pro-Football, Inc., Defendants-
Appellees.
Reggie White; Michael Buck; Hardy Nickerson; Vann McElroy; Dave Duerson,
Plaintiffs-Appellees,
Terry Orr, Intervenor-Appellant,
Shane Collins; Ron Middleton, Intervenors,
Mark Schlereth, Intervenor-Appellant,
Kelly Goodburn; David Gulledge; Ed Simmons, Intervenors,
Matt Elliot; Joe Jacoby, Intervenors-Appellants,
Sidney Johnson; Kurt Gouveia; Ravin Caldwell, Intervenors,
Mark Rypien, Intervenor-Appellant,
James A. Jenkins; Johnny Thomas; Eric Williams; Don Warren; Jeff Bostic;

Todd Bowles, Intervenors,

Ray Brown, Intervenor-Appellant,

Jason Buck, Intervenor,

Earnest A. Byner, Intervenor-Appellant,

Desmond Howard; Anthony Johnson; Brian Mitchell, Intervenors,

Ricky Sanders, Intervenor-Appellant,

Paul SIEVER, Intervenor,

v.

NATIONAL FOOTBALL LEAGUE; The Five Smiths, Inc.; Buffalo Bills, Inc.;

Chicago Bears Football Club, Inc.; Cincinnati Bengals, Inc.; Cleveland

Browns, Inc.; The Dallas Cowboys Football Club, Ltd.; PDB Sports, Ltd.; The

Detroit Lions, Inc.; The Green Bay Packers, Inc.; Houston Oilers, Inc.;

Indianapolis Colts, Inc.; Kansas City Chiefs Football Club, Inc.; The Los

Angeles Raiders, Ltd.; Los Angeles Rams Football Company, Inc.; Miami

Dolphins, Ltd.; Minnesota Vikings Football Club, Inc.; KMS Patriots, L.P.;

The New Orleans Saints Limited Partnership; New York Football Giants, Inc.;

New York Jets Football Club, Inc., Defendants-Appellees,

The Philadelphia Eagles Football Club, Inc.,

Defendant,

B & B Holdings, Inc.; Pittsburgh Steelers Sports, Inc.; The Chargers

Football; The San Francisco Forty-Niners, Ltd.; Seattle Seahawks, Inc.;

Tampa Bay Area NFL Football Club, Inc.; Pro-Football, Inc., Defendants-

Appellees.

Reggie White; Michael Buck; Hardy Nickerson; Vann McElroy; Dave

Duerson, Plaintiffs-Appellees,

Mark DUSBABEK; Carl Lee; Audray McMillian; Felix Wright; Cody Kisien; Mark

Harper; Sammy Martin; Don Beebe; Gregory Scales, Objectors-Appellants,

v.

NATIONAL FOOTBALL LEAGUE; The Five Smiths, Inc.; Buffalo Bills, Inc.;

Chicago Bears Football Club, Inc.; Cincinnati Bengals, Inc.; Cleveland

Browns, Inc.; The Dallas Cowboys Football Club, Ltd.; PDB Sports, Ltd.; The

Detroit Lions, Inc.; The Green Bay Packers, Inc.; Houston Oilers, Inc.;

Indianapolis Colts, Inc.; Kansas City Chiefs Football Club, Inc.; The Los

Angeles Raiders, Ltd.; Los Angeles Rams Football Company, Inc.; Miami

Dolphins, Ltd.; Minnesota Vikings Football Club, Inc.; KMS Patriots, L.P.;

The New Orleans Saints Limited Partnership; New York Football Giants, Inc.;

New York Jets Football Club, Inc., Defendants-Appellees,

The Philadelphia Eagles Football Club, Inc., Defendant,

B & B Holdings, Inc.; Pittsburgh Steelers Sports, Inc.; The Chargers

Football; The San Francisco Forty-Niners, Ltd.; Seattle Seahawks, Inc.;

Tampa Bay Area NFL Football Club, Inc.; Pro-Football, Inc., Defendants-

Appellees.

Reggie WHITE; Michael Buck; Hardy Nickerson; Vann McElroy; Dave Duerson,

Plaintiffs-Appellees,

Maurice Hurst; John Fourcade, Objectors-Appellants,

v.

NATIONAL FOOTBALL LEAGUE; The Five Smiths, Inc.; Buffalo Bills, Inc.;

Chicago Bears Football Club, Inc.; Cincinnati Bengals, Inc.; Cleveland

Browns, Inc.; The Dallas Cowboys Football Club, Ltd.; PDB Sports, Ltd.; The

Detroit Lions, Inc.; The Green Bay Packers, Inc.; Houston Oilers, Inc.;

Indianapolis Colts, Inc.; Kansas City Chiefs Football Club, Inc.; The Los Angeles Raiders, Ltd.; Los Angeles Rams Football Company, Inc.; Miami Dolphins, Ltd.; Minnesota Vikings Football Club, Inc.; KMS Patriots, L.P.; The New Orleans Saints Limited Partnership; New York Football Giants, Inc.; New York Jets Football Club, Inc., Defendants-Appellees,

The Philadelphia Eagles Football Club, Inc., Defendant,

B & B Holdings, Inc.; Pittsburgh Steelers Sports, Inc.; The Chargers Football; The San Francisco Forty-Niners, Ltd.; Seattle Seahawks, Inc.; Tampa Bay Area NFL Football Club, Inc.; Pro-Football, Inc., Defendants-Appellees.

Nos. 93-3375, 93-3381, 93-3382, 93-3403, 93-3415.

United States Court of Appeals,

Eighth Circuit.

Submitted Oct. 12, 1994.

Decided Dec. 6, 1994.

Rehearing and Suggestion for Rehearing En Banc Denied Jan. 20, 1995. [FN*]

FN* Judge Loken took

no part in the consideration or decision of these cases.

Before McMILLIAN, HANSEN, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

MORRIS SHEPPARD ARNOLD, Circuit Judge.

Twenty-six football players ("objectors") appeal the settlement of an antitrust action brought by a certified class of football players against the National Football League. The district court [FN1] initially certified the class in an order issued on April 30, 1993, White v. NFL, 822 F.Supp. 1389 (D.Minn.1993), and approved the settlement in an order and a judgment decree issued on August 20, 1993, White v. NFL, 836 F.Supp. 1458 (D.Minn.1993); White v. NFL, 836 F.Supp. 1508 (D.Minn.1993). The objectors now challenge the district court's certification of a mandatory class represented by the named plaintiffs, the district court's approval of the settlement agreement, and the district court's jurisdiction to enjoin related actions. We affirm.

FN1. The Honorable David S. Doty, United States District Judge for the District of Minnesota.

I.

The settlement agreement purports to end a six-year dispute between the NFL member teams and their player-employees. The central issue in this labor dispute

was the conflict between the players' desire for complete free agency and the NFL's desire to maintain competitive balance among its teams. A 1987 player strike failed to produce a compromise, and various antitrust actions followed. See, e.g., Powell v. NFL, 711 F.Supp. 959 (D.Minn.1989), 930 F.2d 1293 (8th Cir.1989), cert. denied, 498 U.S. 1040, 111 S.Ct. 711, 112 L.Ed.2d 700 (1991) (holding that nonstatutory labor exemption precluded antitrust challenge); Powell/McNeil v. NFL, 764 F.Supp. 1351 (D.Minn.1991) (recognizing National Football League Players Association's disclaimer of its status as exclusive collective bargaining representative, thus ending the nonstatutory labor exemption); and McNeil v. NFL, 1992 WL 315292 (D.Minn.1992) (special verdict finding that employment rules harmed competition for players' services and were more restrictive than necessary to achieve competitive balance among teams). Shortly after the special verdict in McNeil, id., a group of players filed White v. NFL, the class action which resulted in the challenged settlement.

In early 1993, the parties to White v. NFL agreed to settle that case as well as other litigation related to the ongoing employment dispute. The District Court assisted in the settlement process by conditionally certifying a non-opt-out class pursuant to Fed.R.Civ.P. 23(b)(1). White v. NFL, Civ. No. 4- 92-906 (D.Minn.1993); White v. NFL, Civ. No. 4-92-906 (D.Minn.1993). The class consisted of (i) all players who have been, are now, or will

be under contract to play professional football for an NFL club at any time from August 31, 1987, to the date of final approval of the settlement of this action and the determination of any appeal therefrom, and (ii) all college and other football players who, as of August 31, 1987, through the date of final approval of the settlement of this action and the determination of any appeals therefrom, have been, are now, or will be eligible to play football as a rookie for an NFL team. Id. The parties then entered into a settlement agreement, which received preliminary approval from the district court. White v. NFL, Civ. No. 4-92-906 (D.Minn.1993). In accordance with the district court's instructions, the White plaintiffs notified class members of the proposed settlement by mail and by publication of a summary in a national newspaper. Several weeks later the district court convened a hearing to provide those who objected to the proposed settlement with an opportunity to present their views. The district court then issued a lengthy order overruling these objections and enjoining individual lawsuits by class members with similar claims. White v. NFL, 822 F.Supp. 1389 (D.Minn.1993). Approximately one week later, the NFL and the National Football League Players Association entered into a new collective bargaining agreement incorporating the terms of the settlement agreement as well as other rules regarding NFL player-employees. Upon motion to amend the original settlement to conform to the terms of the new collective bargaining agreement, the district court agreed to repeat the

settlement approval process as well as to make additional factual findings. White v. NFL, 836 F.Supp. 1458 (D.Minn.1993). The process of notification, reviewal of objections, and hearings culminated on August 20, 1993, with the district court's entry of an order approving the settlement agreement, id., and final consent judgment. White v. NFL, 836 F.Supp. 1508 (D.Minn.1993).

II.

Mandatory class certification pursuant to Fed.R.Civ.P. 23(b)(1) is subject to the discretion of the district court. See, e.g., Chaffin v. Rheem Mfg. Co., 904 F.2d 1269, 1275 (8th Cir.1990). The objectors contend that the district court erred in failing to apply the standard set forth by the Supreme Court in Phillips Petroleum Co. v. Shutts, which required that "an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court," at least in cases seeking primarily monetary damages. 472 U.S. 797, 811-12, 105 S.Ct. 2965, 2974, 86 L.Ed.2d 628 (1985). In the present case, however, there exists no absent plaintiff whose due process rights must be protected in this fashion. Rather, each of the objectors was subject to the jurisdiction of the district court. See White v. NFL, 836 F.Supp. at 1501-1504.

For a court to exercise personal jurisdiction, the party must have "minimum contacts" with the forum such that the maintenance of the suit does not violate "traditional

notions of fair play and substantial justice." International Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945), citing Milliken v. Meyer, 311 U.S. 457, 463, 61 S.Ct. 339, 342-43, 85 L.Ed. 278 (1940). This personal jurisdiction requirement is not an Article III restriction on the federal courts, but rather an individual liberty interest flowing from the Due Process Clause. Insurance Corp. of Ireland, Ltd., et al. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702, 102 S.Ct. 2099, 2104, 72 L.Ed.2d 492 (1982). Like other such rights, therefore, the personal jurisdiction requirement can be waived. Id. at 703, 102 S.Ct. at 2105. Fed.R.Civ.P. 12(h) contemplates the involuntary waiver of a defense of lack of personal jurisdiction if it is not included in a motion or in a responsive pleading. We have previously held, moreover, that the rule "sets only the outer limits of waiver; it does not preclude waiver by implication." Yeldell v. Tutt, 913 F.2d 533, 539 (8th Cir.1990), citing Marquest Medical Prods. v. EMDE Corp., 496 F.Supp. 1242, 1245 n. 1 (D.Col.1980). Thus when a party had actively participated in discovery, filed various motions, participated in a five-day trial, and filed post-trial motions, the unsupported assertion of a jurisdictional defense in answer to the original complaint did not preclude a determination that the party intended to submit to the court's jurisdiction. Yeldell at 539. The Third Circuit has concluded, we think correctly, that a party to a mandatory class action who appears in court to contest inclusion in the class is analogous to a party

who appears merely to contest jurisdiction, and should be deemed to consent to jurisdiction only if it actually litigates the adequacy of class representation or the underlying merits of the case. In re Real Estate Title and Settlement Servs. Antitrust Litig., 869 F.2d 760, 770-71 (3rd Cir.1989), cert. denied, 493 U.S. 821, 110 S.Ct. 77, 107 L.Ed.2d 44 (1989). In the present case, each of the objectors either had minimum contacts with the forum or submitted himself to the jurisdiction of the district court by appearing through counsel to contest the merits of the settlement, offering testimony, cross-examining witnesses, and filing numerous memoranda of law regarding the settlement. White v. NFL, 836 F.Supp. at 1503. The district court's inclusion of the objectors in the mandatory class thus constituted a proper exercise of discretion.

Because of our view of the jurisdictional issue, we do not reach the issue raised by the objectors and left undecided by Shutts, namely whether a trial court may certify a non-opt-out plaintiff class in an action brought primarily for injunctive relief under Fed.R.Civ.P. 23(b)(1). Shutts, 472 U.S. at 811 n. 3, 105 S.Ct. at 2974 n. 3.

III.

Failing to upset certification of the class, the objectors argue that the named plaintiffs and their counsel inadequately represented the class. Among the prerequisites to a class action is Fed.R.Civ.P. 23(a)(4), which requires that the representative parties "fairly and adequately protect the interests of the class." The objectors cite several

attorneys' prior involvement in related lawsuits, as well as specific awards to the named plaintiffs, as evidence that the settlement agreement was based primarily on the self-interest of the named plaintiffs and their counsel. The adequacy of class representation, however, is ultimately determined by the settlement itself. See In re Corrugated Container Antitrust Litig., 643 F.2d 195, 212 (5th Cir.1981). The district court noted that the previous experience of counsel was "likely a prerequisite to the parties' ultimate agreement to settle," White v. NFL, 822 F.Supp. at 1405, and, more to the point, did not affect counsel's ability to represent the plaintiff class vigorously. With respect to the representative parties' awards, the district court recognized the potential for controversy but cited a series of cases in which named plaintiffs received additional awards based on their efforts and risks in the case. White v. NFL, 822 F.Supp. at 1406, citing, e.g., Thornton v. East Texas Motor Freight, 497 F.2d 416, 420 (6th Cir.1974); Enterprise Energy Corp. v. Columbia Gas Transmission Corp., 137 F.R.D. 240, 250 (S.D.Ohio 1991). There is, moreover, substantial evidence that the settlement agreement provides significant benefits to the class. White v. NFL, 836 F.Supp. at 1479-83. The district court thus reasonably concluded that the interests of the plaintiff class were protected by the settlement agreement.

IV.

The objectors also contest the district court's final approval of the settlement agreement on the grounds that

class members were given inadequate notice of the proposed settlement. Fed.R.Civ.P. 23(e) requires only that notice be given "in such a manner as the court directs" prior to settlement. The district court required direct mailing of notice to all class members' last known address approximately one month prior to the first settlement hearing, as well as publication of notice in a national newspaper. See Grunin v. International House of Pancakes, 513 F.2d 114, 121 (8th Cir.1974) (stating that individualized notice by mail is the best notice practicable in a class action contest) (citations omitted). This notification process was repeated before the hearing regarding the revised settlement agreement. As the district court noted, the proposed settlement agreement also received extensive coverage in the national press. Finally, the district court entertained all objections offered by class members as well as other interested parties, regardless of whether the objections had been submitted in writing by the announced deadline. Under these circumstances, the class members received adequate notice of the proposed settlement and were given multiple opportunities to challenge their inclusion in the plaintiff class.

V.

Finally, the objectors allege that the district court lacked jurisdiction to enjoin related actions pursued in other fora. The district court cites two independently sufficient bases for jurisdiction, personal jurisdiction over the objectors and the All-Writs Act, 28 U.S.C. s 1651. The

All-Writs Act states in relevant part that "all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." While the All-Writs Act is not an independent grant of jurisdiction, the ability to facilitate the present settlement by enjoining related suits of absent class members is ancillary to jurisdiction over the class action itself. See, e.g., In re Corrugated Container Antitrust Litig., 659 F.2d 1332, 1334 (5th Cir.1981), cert. denied, 456 U.S. 936, 102 S.Ct. 1993, 72 L.Ed.2d 456 (1982). If the district court were to approve the settlement without enjoining at least related claims, the agreement would be inadequate to end litigation relating to the labor dispute. Therefore, the district court properly exercised its jurisdiction by enjoining related actions.

VI.

For the foregoing reasons, we affirm the approval of the settlement agreement by the district court.

Reggie WHITE, Michael Buck, Hardy Nickerson, Vann McElroy and Dave Duerson,

Plaintiffs,

v.

NATIONAL FOOTBALL LEAGUE; The Five Smiths, Inc.; Buffalo Bills, Inc.; Chicago Bears Football Club, Inc.; Cincinnati Bengals, Inc.; Cleveland Browns, Inc.; The Dallas Cowboys Football Club, Ltd.; PDB Sports, Ltd.; The Detroit Lions, Inc.; The Green Bay Packers, Inc.; Houston Oilers, Inc.; Indianapolis Colts, Inc.; Kansas City Chiefs Football Club, Inc.; The Los Angeles Raiders, Ltd.; Los Angeles Rams Football Company, Inc.; Miami Dolphins, Ltd.; Minnesota Vikings Football Club, Inc.; KMS Patriots Limited Partnership; The New Orleans Saints Limited Partnership; New York Football Giants, Inc.; New York Jets Football Club, Inc.; The Philadelphia Eagles Football Club, Inc.; B & B Holdings, Inc.; Pittsburgh Steelers Sports, Inc.; The Chargers Football Company; The San Francisco Forty-Niners, Ltd.; The Seattle Seahawks, Inc.; Tampa Bay Area NFL Football Club, Inc.; and Pro-

Football, Inc.; Defendants.

Civ. No. 4-92-906.

United States District Court,

D. Minnesota,

Fourth Division.

Aug. 20, 1993.

ORDER

DOTY, District Judge.

This matter is before the court on defendants' (other than the Philadelphia Eagles) [FN1] motion to hold objector Leslie O'Neal in contempt of this court's order of April 30, 1993. The facts underlying this matter are largely undisputed. On March 3, 1993, defendants moved for an order to show cause why the court should not enjoin all pending and future cases brought by individual class members challenging the same conduct at issue in the present case. On March 4, 1993, the court issued an order to show cause, which included a briefing schedule and a hearing date for the motion.

FN1. Counsel for the Philadelphia Eagles informed the court that they take no position on the present motion. Accordingly, any reference to "defendants" does not include the Eagles.

On March 18, 1993, a group of players, including

Leslie O'Neal, filed a memorandum in opposition to defendants' motion to enjoin. At the hearing on April 16, 1993, counsel for Mr. O'Neal argued that the court should not grant the antisuit injunction. On April 30, 1993, the court issued an order which, inter alia, granted defendants' motion to enjoin various pending lawsuits, which were cited in the order. [FN2] The cases cited included O'Neal v. NFL, No. 92-4368 (C.D.Cal.).

FN2. The actions specifically enjoined are: (a) Hurst v. NFL, No. 92- 3263 (E.D.La.); (b) Dusbabek v. NFL, No. 4-93-126 (D.Minn.); (c) Lee v. NFL, No. 4-93-125 (D.Minn.); (d) McMillian v. NFL, No. 4-93-99 (D.Minn.); (e) Wright v. NFL, No. 4-93-124 (D.Minn.); (f) Jones v. NFL, No. 92-2512 (C.D.Cal.); (g) Sanders v. NFL, No. 92-4365 (C.D.Cal.); (h) Matthews v. NFL, No. 92-4370 (C.D.Cal.); (i) Hunter v. NFL, No. 92-4373 (C.D.Cal.); (j) O'Neal v. NFL, No. 92-4368 (C.D.Cal.); (k) Allen v. NFL, No. 92-7536 (C.D.Cal.); (l) Norton v. NFL, No. 93-0029 (C.D.Cal.); (m) Hurst & Fourcade v. NFL, No. 93-0766 (E.D.La.); (n) Harper v. NFL, No. 4-93-314 (D.Minn.); (o) Risien v. NFL, No. 4-93-182 (D.Minn.); (p) Duncan v. NFL, No. 93-1481 (C.D.Cal.); and (q) Evans v. NFL, Civ. No. 92-878 (D.Ariz.). See White v. National Football League, 822 F.Supp. 1389, 1436-37 (D.Minn.1993).

The order further stated that: All members of the

plaintiff class in the present action are permanently enjoined from further pursuit or prosecution of the above listed actions, or any other actions now pending that purport to challenge the same player practices at issue here, or challenge the Stipulation and Settlement Agreement in this action. In addition, all members of the plaintiff class are permanently enjoined from initiating any such actions in the future. The court shall also retain jurisdiction over this action to effectuate and enforce the terms of the injunctions and Stipulation and Settlement Agreement. Id. at 1437.

Status reports concerning several of the cases enjoined by this court were subsequently filed in the Central District of California. The status reports disclosed various rulings set forth in this court's order of April 30, 1993, including the foregoing injunctive relief and this court's determination that various players, including Leslie O'Neal, [FN3] had voluntarily submitted to this court's jurisdiction by actively participating in the litigation of the merits of the present action. Id. at 1432-33. [FN4]

FN3. Those players are: Sean Jones, Eric Allen, Leslie O'Neal, Eric Sanders, Ken Norton, Jr., Curtis Duncan, Patrick Hunter, William C. Matthews, Cris Dishman, Lomas Brown, Neil Smith, Van Waiters, Broderick Thompson and Jerry Ball. Id. at 1432.

FN4. The order specifically stated that: As a result of their various filings with the court, their appearance to

object to the settlement and their motions to intervene, the court finds that [the listed] players have submitted to the court's jurisdiction because they have not confined their arguments to the claims that they are beyond the court's jurisdiction, but rather have objected to the merits of the proposed settlement. Id. at 1432.

On May 17, 1993, Judge Consuelo B. Marshall of the United States District Court for the Central District of California, on her own motion, removed the case of O'Neal v. NFL, No. 92-4368 (C.D.Cal.) "from the active caseload pending further Order of this Court." [FN5]

FN5. Judge Marshall also removed from the active caseload various other cases enjoined by this court's order of April 30, 1993.

On July 6, 1993, counsel for Leslie O'Neal brought a motion before Judge Marshall to return the case of O'Neal v. NFL, No. 92-4368 (C.D.Cal.) to the active caseload. [FN6] In his papers, Mr. O'Neal requested that Judge Marshall: (1) return his case to the active calendar; (2) lift the stipulated stay of his action; and (3) permit him "to prosecute his damages action against defendants without further delay." See Memorandum of Points and Authorities in Support of Motion to Return Case to the Active Calendar at 4 (July 2, 1993). The memorandum further stated that Mr. O'Neal was "prepared to move forward immediately

with partially dispositive motions and trial." Id. at 17.

FN6. The papers filed included a notice of motion, the motion, a memorandum of points and authorities in support thereof, a supporting declaration of counsel Suzelle M. Smith, and a proposed order.

On July 7, 1993, this court conducted a hearing on various motions in the present case, including motions to amend the White Settlement Agreement and for further factual findings. At the hearing, defendants' counsel brought Mr. O'Neal's motion in the Central District of California to this court's attention and stated that defendants believed that the motion violated this court's order of April 30, 1993. See Transcript of Final Fairness Hearing at 54-55 (D.Minn. July 7, 1993). Defendants' counsel requested that the court hold Mr. O'Neal "in contempt of the court's injunction entered April 30th." Id. at 117. Defendants' counsel also asked: that the court suspend or stay the determination of any sanction that would be applied to them pending the outcome of their appeal to the Eighth Circuit. We would herewith make that request. Id. This court informed Mr. O'Neal's counsel that "you are on notice at least of the request", and that she should "give notice that the court is thinking about an order to show cause." Id. at 118-19. The court then requested that defendants make any motion for an order to show cause by July 15, 1993. The court also stated that anything else

concerning that issue could be brought to the court's attention "informally; that is by letter form rather than a formal brief." Id. at 120.

On July 12, 1993, defendants moved for an order to show cause, and the court granted that motion in its order of July 13, 1993. On August 10, 1993, the court conducted a hearing on the present matter.

Based on the arguments of counsel, and the file, record and proceedings herein, the court makes the following findings:

1. The court has personal jurisdiction over Mr. O'Neal because he voluntarily submitted to this court's jurisdiction by actively litigating the underlying merits of the present case.

2. The court also has jurisdiction over Mr. O'Neal pursuant to the court's certification, under Federal Rule of Civil Procedure 23(b)(1), of a mandatory class of which Mr. O'Neal is a member.

3. In addition, the court has jurisdiction to enjoin O'Neal v. NFL, No. 92-4368 (C.D.Cal.) under the All-Writs Act. 28 U.S.C. s 1651(a).

4. In its order of April 30, 1993, the court permanently enjoined Mr. O'Neal "from further pursuit or prosecution of" his action, O'Neal v. NFL, No. 92- 4368 (C.D.Cal.).

5. On July 6, 1993, Mr. O'Neal filed a notice of motion, a motion and supporting papers to return that case to the active caseload of the Central District of California.

6. Mr. O'Neal's motion to return his case to the active caseload constitutes "further pursuit or prosecution of" O'Neal v. NFL, No. 92-4368 (C.D.Cal.), in violation of the express terms of this court's order of April 30, 1993.

7. Based on the foregoing, the court finds that Mr. O'Neal is in contempt of this court's order of April 30, 1993.

Accordingly, IT IS HEREBY ORDERED that:

1. Defendants' motion to hold Mr. O'Neal in contempt is granted.

2. Mr. O'Neal may purge himself of this contempt by withdrawing his motion to return his case to the active caseload of the Central District of California by August 27, 1993, notifying this court of such withdrawal, and taking no further action inconsistent with this court's order of April 30, 1993.

3. If the motion is not withdrawn, the court will entertain a motion to show cause why the court should not hold Mr. O'Neal's counsel in contempt of this court's order of April 30, 1993.

4. In the event that the contempt is not purged, the court will defer imposition of sanctions pending the outcome of Mr. O'Neal's appeal, if any, in the present action.

Reggie WHITE, Michael Buck, Hardy Nickerson, Vann McElroy and Dave Duerson,

Plaintiffs,

v.

NATIONAL FOOTBALL LEAGUE; The Five Smiths, Inc.; Buffalo Bills, Inc.; Chicago Bears Football Club, Inc.; Cincinnati Bengals, Inc.; Cleveland Browns, Inc.; The Dallas Cowboys Football Club, Ltd.; PDB Sports, Ltd.; The Detroit Lions, Inc.; The Green Bay Packers, Inc.; Houston Oilers, Inc.; Indianapolis Colts, Inc.; Kansas City Chiefs Football Club, Inc.; The Los Angeles Raiders, Ltd.; Los Angeles Rams Football Company, Inc.; Miami Dolphins, Ltd.; Minnesota Vikings Football Club, Inc.; KMS Patriots Limited Partnership; The New Orleans Saints Limited Partnership; New York Football Giants, Inc.; New York Jets Football Club, Inc.; The Philadelphia Eagles Football Club, Inc.; B & B Holdings, Inc.; Pittsburgh Steelers Sports, Inc.; The Chargers Football Company; The San Francisco Forty-Niners, Ltd.; The Seattle Seahawks, Inc.; Tampa Bay Area NFL Football Club, Inc.; and Pro-

Football, Inc.; Defendants.

Civ. No. 4-92-906.

United States District Court,

D. Minnesota,

Fourth Division.

Aug. 20, 1993.

DOTY, District Judge.

There having been executed a Stipulation and Settlement Agreement, dated February 26, 1993, providing for settlement of this action upon the terms and conditions set forth therein; and

There having been an application to this court for an order and judgment pursuant to Rule 23(e) of the Federal Rules of Civil Procedure approving the February 26 Stipulation and Settlement Agreement as fair, reasonable, and adequate; and

This court having determined by an order dated February 17, 1993 that this action may be maintained as a class action pursuant to Rule 23(b)(1) of the Federal Rules of Civil Procedure, on behalf of (i) all players who have been, are now, or will be under contract to play professional football for an NFL club at any time from August 31, 1987 to the date of final approval of the settlement of this action and the determination of any appeal therefrom, and (ii) all college and other football players who, as of August 31, 1987 through the date of final approval of the settlement of

this action and the determination of any appeals therefrom, have been, are now, or will be eligible to play football as a rookie for an NFL team; and

This court, by an order dated February 26, 1993, having determined preliminarily that the original Stipulation and Settlement Agreement is fair, reasonable, and adequate, and having approved two proposed forms of notice, and having directed that notice be given to all class members, pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, informing them of the proposed settlement of the action and of a hearing to be held on April 16, 1993 to determine whether the original Stipulation and Settlement Agreement should be finally approved by the court as fair, reasonable, and adequate; and due proof of mailing of the Notice to Class and of publication of the Summary Notice having been filed with the court; and

A hearing having been held before this court on April 16, 1993, pursuant to the court's February 26, 1993 order, at which all class members were afforded the opportunity to object to or otherwise express their views on the fairness, reasonableness, and adequacy of the settlement embodied in the February 26 Stipulation and Settlement Agreement; and

This court having considered the objections of certain class members as well as the Philadelphia Eagles and other interested persons; and

This court having determined that plaintiffs' predominant claim for relief is structural, injunctive relief

and therefore that mandatory class certification pursuant to Rule 23(b)(1) is proper; and

This court after due deliberation upon presentation of all the relevant facts, having rendered its determination that the February 26 Stipulation and Settlement Agreement is fair, reasonable, and adequate and should be approved in all respects, and that all objections to the proposed settlement should be overruled, for the reasons stated in the court's order of April 30, 1993, 822 F.Supp. 1389; and

The parties, on May 6, 1993 and before entry of a judgment pursuant to Rule 23(e), having agreed to certain amendments to the February 26 Stipulation and Settlement Agreement; [FN1] and

FN1. The Philadelphia Eagles object to this reference to "the parties", contending that they do not agree to proposed amendments. For the reasons set forth in the court's order of August 19, 1993, the court finds that the Eagles have no standing to object to that wording and are bound by the actions of the NFL Management Council. See White v. National Football League, 836 F.Supp. 1458, 1491-92 (D.Minn.1993).

There having been an application to this court for an order and judgment pursuant to Rule 23(e) of the Federal Rules of Civil Procedure approving the Stipulation and Settlement Agreement, as amended, as fair, reasonable, and adequate; and

A hearing having been held before this court on June 1, 1993, at which all class members and other interested persons were afforded the opportunity to object to or otherwise express their views as to whether the proposed amendments to the Stipulation and Settlement Agreement should be preliminarily approved as fair, reasonable, and adequate, and whether notice to the class should be ordered; and

This court, by an order dated June 2, 1993, having determined preliminarily that the proposed amendments to the Stipulation and Settlement Agreement were fair, reasonable, and adequate to all class members, and having approved two forms of notice, and having directed that notice be given to all class members likely to be affected by the proposed amendments to the Stipulation and Settlement Agreement, pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, informing them of the proposed amendments to the settlement of the action and of a hearing to be held on July 7, 1993 to determine whether the Stipulation and Settlement Agreement, as amended, should be finally approved by the court as fair, reasonable, and adequate; and due proof of mailing of the Notice to Class and of publication of the Summary Notice having been filed with the court; and

A hearing having been held before this court on July 7, 1993, pursuant to the court's June 2, 1993 order, at which all class members were afforded the opportunity to object to or otherwise express their views on the fairness,

reasonableness, and adequacy of the settlement embodied in the Stipulation and Settlement Agreement, as amended; and

This court having once again fully considered the objections of certain class members as well as the Philadelphia Eagles; and

This court after due deliberation upon presentation of all the relevant facts, having rendered its determination that the settlement embodied in the Stipulation and Settlement Agreement, as amended, is fair, reasonable, and adequate and should be approved in all respects, and that all objections to the proposed settlement, and the amendments thereto, should be overruled, and hereby are overruled, for the reasons stated in the court's accompanying opinion of August 19, 1993,

THEREFORE, without trial or final adjudication of any issue of fact or law herein and upon consent of the parties, it is:

ORDERED AND ADJUDGED, that the terms of the settlement of this action as set forth in the Stipulation and Settlement Agreement dated February 26, 1993, as amended on May 6, 1993, a copy of which is annexed hereto as Exhibit 1, are a fair, reasonable, and adequate settlement of the claims asserted in this action, and that said Stipulation and Settlement Agreement, as amended, be, and it hereby is, approved in all respects; and it is further

ORDERED AND ADJUDGED, that the terms of the Stipulation and Settlement Agreement, as amended, are incorporated into and made part of this Final Consent

Judgment; and it is further

ORDERED AND ADJUDGED, that the parties are hereby authorized and directed to consummate the terms and provisions of the Stipulation and Settlement Agreement, as amended; and it is further

ORDERED AND ADJUDGED, that the claims and counterclaims set forth in this action be, and they hereby are, dismissed on the merits, with prejudice and without costs (except those costs set forth in the Stipulation and Settlement Agreement, as amended), and the action is discontinued accordingly; and it is further

ORDERED AND ADJUDGED, that this Final Consent Judgment be, and it hereby is, a full and final discharge of, and conclusive as to, any and all liability with respect to the claims or counterclaims as specified in Article XIX of the Stipulation and Settlement Agreement, as amended; and it is further

ORDERED AND ADJUDGED, that in accordance with the terms of the Stipulation and Settlement Agreement, as amended, and without in any way affecting the finality of this Final Consent Judgment, this court retains exclusive jurisdiction over this action to effectuate and enforce the terms of the Stipulation and Settlement Agreement, as amended, and this Judgment; and it is further

ORDERED AND ADJUDGED, that no application for attorneys' fees or costs will be submitted by any party in this case.

LET JUDGMENT BE ENTERED

ACCORDINGLY.

Reggie WHITE, Michael Buck, Hardy Nickerson, Vann McElroy and Dave Duerson,

Plaintiffs,

v.

NATIONAL FOOTBALL LEAGUE; The Five Smiths, Inc.; Buffalo Bills, Inc.; Chicago Bears Football Club, Inc.; Cincinnati Bengals, Inc.; Cleveland Browns, Inc.; The Dallas Cowboys Football Club, Ltd.; PDB Sports, Ltd.; The Detroit Lions, Inc.; The Green Bay Packers, Inc.; Houston Oilers, Inc.; Indianapolis Colts, Inc.; Kansas City Chiefs Football Club, Inc.; The Los Angeles Raiders, Ltd.; Los Angeles Rams Football Company, Inc.; Miami Dolphins, Ltd.; Minnesota Vikings Football Club, Inc.; KMS Patriots Limited Partnership; The New Orleans Saints Limited Partnership; New York Football Giants, Inc.; New York Jets Football Club, Inc.; The Philadelphia Eagles Football Club, Inc.; B & B Holdings, Inc.; Pittsburgh Steelers Sports, Inc.; The Chargers Football Company; The San Francisco Forty-Niners, Ltd.; The Seattle Seahawks, Inc.; Tampa Bay Area NFL Football Club, Inc.; and Pro-

Football, Inc., Defendants.

Civ. No. 4-92-906.

United States District Court,

D. Minnesota,

Fourth Division.

Aug. 19, 1993.

DOTY, District Judge.

This matter is before the court on the following motions:

1. A motion by the named plaintiffs to amend the Stipulation and Settlement Agreement in the present action;

2. A motion by the named plaintiffs and defendants, other than the Philadelphia Eagles [FN1], for final approval of the Stipulation and Settlement Agreement as modified by the various amendments agreed to by the parties;

FN1. The Philadelphia Eagles purport to object to the various motions before the court. Thus, when discussing those motions, the terms "defendants" and "parties", unless otherwise indicated, do not include the Philadelphia Eagles.

3. A motion by the named plaintiffs and defendants, other than the Philadelphia Eagles, for entry of various factual findings concerning the reconstitution and recognition of the National Football League Players Association ("NFLPA") as a labor union and the application

of the nonstatutory labor exemption to various terms of a recently executed collective bargaining agreement; and

4. A motion by the named plaintiffs to sanction the Philadelphia Eagles.

Based on a review of the file, record and proceedings herein, the court grants the motion to amend the Stipulation and Settlement Agreement, grants final approval of the amended version of the Stipulation and Settlement Agreement, denies plaintiffs' motion for sanctions, overrules all objections, grants the motion for further factual findings and makes the findings set forth below.

BACKGROUND [FN2]

FN2. The history of the present action and various other lawsuits involving players and the National Football League is more fully set forth in the court's opinion of April 30, 1993. White v. National Football League, 822 F.Supp. 1389 (D.Minn.1993).

This antitrust action was filed on September 21, 1992, less than two weeks after a jury rendered its verdict in McNeil v. National Football League, 1992-2 Trade Cas. (CCH) P 69,982, 1992 WL 315292 (D.Minn. Sept. 10, 1992) (special verdict). [FN3] The five named plaintiffs [FN4] brought the present action on behalf of:

FN3. In McNeil, eight individual football players whose contracts with their National Football League ("NFL") employers expired on February 1, 1990, brought

an action alleging, inter alia, that the NFL's right of first refusal/compensation rules, as set forth in Plan B, violate Section 1 of the Sherman Act.

FN4. Those players are: Reggie White, Michael Buck, Hardy Nickerson, Vann McElroy and Dave Duerson.

(i) all players who have been, are now, or will be under contract to play professional football for an NFL club at any time from August 31, 1987 to the date of final judgment in this action and determination of any appeal therefrom, and (ii) all college and other football players who, as of August 31, 1987, to the date of final judgment in this action and the determination of any appeal therefrom, have been, are now, or will be eligible to play football as a rookie for an NFL team. (Pls.' Second Am.Compl. at 8.)

The White complaint, which originally sought only injunctive relief, was amended to seek both antitrust damages and injunctive relief stemming from the operation of the right of first refusal rules of Plan B, the college draft, the NFL Player Contract and the preseason pay rules. [FN5] Defendants, the NFL and its twenty-eight member clubs, answered the complaint, denying all of plaintiffs' material allegations and asserting various affirmative defenses and counterclaims.

FN5. The second amended complaint also alleges that defendants illegally fixed players' medical insurance

benefits and tortiously interfered with players' prospective contracts.

On January 6, 1993, the parties, with the assistance of this court, reached a tentative agreement to settle the present action. By order dated January 6, 1993, as amended and reaffirmed on February 17, 1993, the court certified, for the purposes of settlement, a damages and injunctive relief class pursuant to Federal Rule of Civil Procedure 23(b)(1) consisting of: (i) all players who have been, are now, or will be under contract to play professional football for an NFL club at any time from August 31, 1987 to the date of final approval of the settlement of this action and the determination of any appeal therefrom, and (ii) all college and other football players who, as of August 31, 1987, through the date of final approval of the settlement of this action and the determination of any appeals therefrom, have been, are now, or will be eligible to play football as a rookie for an NFL team. See White v. National Football League, Civ. No. 4-92-906, slip op. (D.Minn. Jan. 6, 1993) (entered nunc pro tunc); White v. National Football League, Civ. No. 4-92-906, slip op. (D.Minn. Feb. 17, 1993).

On February 26, 1993, plaintiffs and defendants entered into a Stipulation and Settlement Agreement ("the original Settlement Agreement") which set forth the terms of the settlement as originally proposed. The Settlement Agreement was designed to bring an end to both the present

action and a wide range of related cases. [FN6]

FN6. As the court noted in its order of April 30, 1993: Those mandatory class certification orders have provided a vehicle for the settlement of, among other things, all player challenges to the Plan B veteran player reservation rules, the college draft and the preseason pay rules. White, 822 F.Supp. at 1395. For many years, those and other player rules have been the source of numerous disputes between players and the NFL. See id. at 1394 n. 2, 1416 n. 36 (listing various player disputes).

In an order dated February 26, 1993, this court granted preliminary approval of the original Settlement Agreement. See White v. National Football League, Civ. No. 4-92-906, slip op. at 2-3 (D.Minn. Feb. 26, 1993). Pursuant to Federal Rule of Civil Procedure 23(e), the court ordered plaintiffs, at their own expense, to send written notice by mail to class members. [FN7] The court also ordered plaintiffs to publish a summary notice in USA Today. The notices, the contents of which were approved by the court, described the terms of the proposed settlement and informed all class members that a final approval hearing would be held on April 16, 1993, to determine whether the proposed settlement was fair, reasonable and adequate. The notices also informed class members that they had a right to submit written objections and to appear at the final approval hearing, in person or by counsel, to be heard in support of, or in opposition to, the settlement, or make any other

statement of their position concerning the settlement. See id.

FN7. On March 12, 1993, plaintiffs mailed notice to 4,957 class members who are current or former NFL players. During the week of March 8, 1993, plaintiffs mailed notices to 343 college players who attended the 1993 NFL Rookie Combine.

In a class of more than 5,000 players, objections to the original Stipulation and Settlement Agreement were filed on behalf of seventy-three active or former NFL players. [FN8] In addition, objections to the original settlement were filed on behalf of one NFL member club, the Philadelphia Eagles, sixteen college players, [FN9] and one player agent. [FN10]

FN8. As of the deadline for filing objections to the original Stipulation and Settlement Agreement, April 2, 1993, the following active or former NFL players had filed objections: Wilber Marshall, Paul Gruber, Brian Washington, Carl Lee, Mark Dusbabek, Audray McMillian, Felix Wright, Cody Risien, Mark Harper, Sammy Martin, Mike Farr, Pepper Johnson, Don Beebe, Gregory Scales, Gregory J. Baty, Barry Sanders, Luis Sharpe, Steve Atwater, Horatio Benny Blades, James Hasty, Byron Evans, Michael C. Johnson, Reggie Langhorne, Maurice Hurst, John Fourcade, Sean Jones, Eric Allen, Leslie O'Neal, Eric

Sanders, Ken Norton, Jr., Curtis Duncan, Patrick Hunter, William C. Matthews, Cris Dishman, Lomas Brown, Neil Smith, Van Waiters, Broderick Thompson, Terry Orr, Shane Collins, Ron Middleton, Mark Schlereth, Kelly Goodburn, David Gulledge, Ed Simmons, Matt Elliott, Joe Jacoby, Sidney Johnson, Kurt Gouveia, Ravin Caldwell, Mark Rypien, James Jenkins, Johnny Thomas, Eric Williams, Don Warren, John Elliott, Duane Bickett and Steve Young. After the April 2, 1993 deadline, additional objections to the original Stipulation and Settlement Agreement were filed on behalf of Brian Blades, Roland James, Pat Carter, Kenneth F. Ruettgers, Jerry Ball, Jeff Bostic, Todd Bowles, Ray Brown, Jason Buck, Earnest A. Byner, Desmond Howard, Anthony Johnson, Brian Mitchell, Ricky Sanders and Paul Siever. At the hearing for final approval of the original Stipulation and Settlement Agreement, the court granted all motions to extend time, ruling that all objections filed as of the hearing date, April 16, 1993, would be considered by the court, whether such objections were timely filed or not. The court further ruled that April 16, 1993, was the deadline for objections to the original version of the Stipulation and Settlement Agreement, and that it would not consider any objections filed after that date. On February 10, 1993, the Tice action, another case involving preseason claims, was transferred from the District of Columbia to this court by order of Judge Royce C. Lamberth. Tice v. Pro Football, Inc., 812 F.Supp. 255 (D.D.C.1993); Tice, 812 F.Supp. 255

(D.Minn. transferred Feb. 10, 1993). At the preliminary approval hearing, some of the Tice plaintiffs objected to the settlement of the preseason pay claims within the context of White. Those objections were withdrawn for purposes of final approval of the original Settlement Agreement, although a few players have filed individual objections to the settlement of the preseason pay within the scope of the White class action. (See, e.g., Letter from Gregory J. Baty to the court dated March 31, 1993) ("the Tice case regarding preseason pay claims should not have been included in any Reggie White settlement").

FN9. One college player, Brian Pressler, filed a timely objection to the original Stipulation and Settlement Agreement, purportedly on behalf of himself and all other present and future "college and other football players" similarly situated. Untimely objections to the original Agreement were filed on behalf of college players Jesse Becton, Scott Brown, Rudy Thompson, Ernie Lewis, Eugene Brown, Percy Coleman, James Chinn, Ron Alexander, Brad LaCombe, Dan Purcell, Steve Ross, Ron Moran, Steve Robinson, Garrett Washington and Bennie Hargro. None of the foregoing college players were drafted in the 1993 College Draft or signed contracts with any NFL club for the 1993 season.

FN10. Robert J. Sheridan, who represents the sixteen college player- objectors, filed the objection

purportedly on behalf of himself, and all other present and future agents and attorney-agents similarly situated.

On April 16, 1993, the court held a final approval hearing on the original Stipulation and Settlement Agreement. The court heard arguments by counsel and class members both in support of and in objection to the proposed settlement. The court also heard testimony of various witnesses concerning the proposed settlement. [FN11] By order dated April 30, 1993, the court certified a mandatory settlement class pursuant to Federal Rule of Civil Procedure 23(b)(1), overruled all objections and granted final approval of the settlement. White v. National Football League, 822 F.Supp. 1389 (D.Minn.1993). In so ruling, the court specifically found that:

FN11. Any person who wanted to argue or testify was permitted to do so.

(a) The terms of the Stipulation and Settlement Agreement fundamentally modify the NFL's rules, policies and practices regarding veteran player movement and employment. The settlement also fundamentally modifies by agreement the college draft, the NFL Player Contract, and various other terms and conditions of NFL player employment. (b) The revised player mobility and employment rules represent a successful effort by NFL players to eliminate Plan B, and to bring about substantial

modifications in the principles relating to veteran player transfers. (c) Under Eighth Circuit law, when evaluating the present Settlement Agreement, it is unnecessary for the court to determine whether every provision of the settlement, if adopted outside a settlement context and made subject to a trial on the merits, would be deemed reasonable after a full rule of reason inquiry. In fact, the court should not make such inquiry. (d) The Settlement Agreement, as a whole, is not per se illegal. (e) The court overrules all objections for the reasons previously set forth, and concludes that the overall agreement is fair, reasonable and adequate to the class. Id. P 7.29, at 1431-32. The court further concluded that class members had been properly notified of the proposed class certification and the terms of the original settlement, id. s I, at 1399-1402, and that due process did not require that absent class members be given the right to opt out of the White class. Id. s III, at 1410-12. [FN12]

FN12. The court also permitted various objectors to intervene solely for purposes of preserving their right to appeal, id. s VIII, at 1432-33, and granted defendants' motions to permanently enjoin various other lawsuits. Id. s IX, at 1433-35.

In addition to its rulings concerning the settlement itself, the court also made various findings concerning the status of the NFLPA in its order dated April 30, 1993. In

August 1987, the last collective bargaining agreement between players and defendants expired ("the 1982 Collective Bargaining Agreement"). [FN13] In Powell v. National Football League, a class action in which players sought to challenge, inter alia, a predecessor of the Plan B veteran player restraints, the Eighth Circuit determined that the nonstatutory labor exemption [FN14] would continue to protect NFL veteran player rules from antitrust scrutiny after the expiration of a collective bargaining agreement as long as an "ongoing collective bargaining relationship" existed between the players and the NFL. 888 F.2d 559, 568 (8th Cir.1989), superseded by, 930 F.2d 1293, 1303 (8th Cir.1989), cert. denied, 498 U.S. 1040, 111 S.Ct. 711, 112 L.Ed.2d 700 (1991). [FN15] The Eighth Circuit did not, however, specify at what point the exemption would end, or what actions would be required to terminate the collective bargaining relationship. Powell, 930 F.2d at1303 cents R93220348;0012;91084290 ("Upon the facts currently presented by this case, we are not compelled to look into the future and pick a termination point for the labor exemption.")

FN13. However, the 1982 Collective Bargaining Agreement provided that the provisions concerning the college draft would not expire until "at least 1992". See 1982 Collective Bargaining Agreement art. XIII, s 1 ("Commencing with the college draft to be held on or about May 1, 1983, and with respect to the college draft to be

held on or about May 1 each year thereafter, through at least 1992, the following principles will apply....").

FN14. As this court previously noted: The nonstatutory labor exemption ... exempts certain anticompetitive union- employer activities from antitrust sanctions. The Supreme Court has recognized that in order to properly accommodate the congressional policy favoring free competition in business markets with the congressional policy favoring collective bargaining under the National Labor Relations Act, 29 U.S.C. s 151 et seq., certain union-employer agreements must be accorded a limited nonstatutory exemption from antitrust sanctions. Generally, whether the nonstatutory exemption will protect a particular agreement turns upon whether the relevant federal labor policy is deserving of preeminence over federal antitrust policy under the circumstances of the particular case. Powell v. National Football League, 678 F.Supp. 777, 782 (D.Minn.1988) (citations omitted), rev'd on other grounds, 888 F.2d 559, 568 (8th Cir.1989), superseded by, 930 F.2d 1293, 1303 (8th Cir.1989), cert. denied, 498 U.S. 1040, 111 S.Ct. 711, 112 L.Ed.2d 700 (1991); see generally Daniel J. Gifford, Redefining the Antitrust Labor Exemption, 72 Minn.L.Rev. 1379, 1404-08 (1988) (detailing history of the nonstatutory labor exemption); Note, Releasing Superstars from Peonage: Union Consent and the Nonstatutory Labor Exemption, 104 Harvard L.Rev. 874, 875-78 (1991) (discussing genesis of the exemption).

FN15. In reaching that result, the Eighth Circuit overturned this court's ruling that the nonstatutory labor exemption terminates when the parties reach impasse on a particular term or condition of employment. See Powell, 678 F.Supp. at 786-89 (holding that exemption terminates at impasse); McNeil v. National Football League, 790 F.Supp. 871, 881-84 (D.Minn.1992) (discussing the history of this court's rulings in Powell on the scope of the nonstatutory labor exemption); see generally Jonathan S. Shapiro, Note, Warming the Bench: The Nonstatutory Labor Exemption in the National Football League, 61 Fordham L.Rev. 1203, 1218-27 (1993) (discussing Eighth Circuit's reversal of this court's determination that impasse was the proper termination point for the exemption, exploring the merits of various termination points and concluding that impasse represents the "best solution").

In light of the Eighth Circuit's decision in Powell, players and the NFLPA sought to terminate the collective bargaining relationship so that players would be free to pursue their antitrust claims. This court, in its order of May 23, 1991, determined that various actions taken by the players and the NFLPA resulted in the termination of the NFLPA's "status as a labor organization" sometime in November or December of 1989. Powell v. National Football League, 764 F.Supp. 1351, 1356 (D.Minn.1991) (holding only in McNeil); see Pittsburgh Steelers, Inc., No. 6-CA-23143, 1991 WL 144468, at *4 (June 26, 1991)

(opinion by the Associate General Counsel of the NLRB finding that "the NFLPA has effectively disclaimed its representational rights and has converted itself from a Section 2(5) labor organization to a trade association"). On June 12, 1991, the Eighth Circuit denied defendants' motion for interlocutory appeal of this court's determination in McNeil that the NFLPA had ceased to function as a labor union. McNeil, No. 91-8088 (8th Cir. June 12, 1991). As a result, eight individual players were able to pursue their antitrust claims in McNeil.

After the parties reached a tentative global settlement, the Board of the NFLPA passed a resolution seeking to again become the collective bargaining representative of the players. [FN16] In mid-January 1993, the NFLPA began to collect authorization cards from NFL players designating it as their exclusive collective bargaining representative.

FN16. The NFL defendants still maintain that the NFLPA has never ceased to function as the players' bargaining representative, and thus the nonstatutory labor exemption has never ended.

By letter dated March 23, 1993, the NFLPA informed the NFL that: [a] majority of the players on 1992 season-ending rosters have now signed cards authorizing the NFLPA to represent them for purposes of collective bargaining. (Letter from Richard A. Berthelsen to Paul

Tagliabue dated March 23, 1993.) After an independent entity, the American Arbitration Association, confirmed the authenticity of the cards, the NFL voluntarily recognized the NFLPA as the exclusive collective bargaining representative of the NFL players. (Letter from Harold Henderson to Eugene Upshaw dated March 29, 1993.)

On March 31, 1993, the NFLPA and representatives of the NFL Management Council, the multi-employer bargaining unit of the NFL owners, began negotiating in an effort to reach a new collective bargaining agreement. Those negotiations remained ongoing as of April 30, 1993, the date on which the court granted final approval of the original Stipulation and Settlement Agreement. White, 822 F.Supp. at 1397 n. 9.

In the order of April 30, 1993, the court made the following findings concerning the NFLPA: (1) The NFLPA has been lawfully formed and selected by the players to serve as the exclusive collective bargaining representative of all present and future NFL players. (2) Neither the NFL nor any of its members have taken any action which in any way hindered or supported the formation of the NFLPA as the exclusive collective bargaining representative of all present and future NFL players. (3) The NFL and its member clubs have lawfully recognized the NFLPA as the players' exclusive collective bargaining representative. (4) Accordingly, the NFLPA is fully authorized and empowered to enter into a new collective bargaining agreement with the NFL and its member clubs. Id. P 10.7, at 1435-36.

The original Settlement Agreement anticipated that the parties might reach a new collective bargaining agreement which incorporated those player movement rules set forth in the Settlement Agreement. The court did not enter final judgment on its order of April 30, 1993, because the parties were still attempting to negotiate such an agreement.

On May 6, 1993, the NFLPA and the NFL reached agreement on the terms of a new collective bargaining agreement (hereinafter "the Collective Bargaining Agreement"). On that date, the parties to various lawsuits involving the NFLPA's group licensing program also reached final agreement on the terms of a settlement of those group licensing cases. As a result of those negotiations, the parties also agreed to amend various provisions of the Stipulation and Settlement Agreement, and plaintiffs moved the court to approve those amendments ("the proposed amendments"). The parties also made a joint motion requesting that the court reconfirm its prior findings and make further factual findings concerning the NFLPA's status and the scope and applicability of the nonstatutory labor exemption ("the requested findings").

The court held another preliminary hearing on June 1, 1993, to determine whether the proposed amendments to the Settlement Agreement and the requested findings fell within the range of possible approval, and whether the proposed notice and method by which notice would be given satisfied the requirements of due process. The court heard

arguments both in support of and opposition to the pending motions. [FN17] On June 2, 1993, the court preliminarily approved the proposed changes, scheduled a final settlement hearing for July 7, 1993, and ordered that notice of the proposed changes and date of the final hearing be provided to the class. [FN18] White v. National Football League, Civ. No. 4-92-906, slip op. at 6-7 (D.Minn. June 2, 1993). [FN19] The order further required that any class member wishing to appear at the final settlement hearing file notice of such intent, along with any papers setting forth the class member's position concerning the pending motions, by June 22, 1993. See id. at 7-8.

FN17. All those who had previously objected to the original Stipulation and Settlement Agreement were notified of the preliminary approval hearing on June 1, 1993. Representatives of the following objectors were present at that hearing: Carl Lee, Mark Dusbabek, Audray McMillian, Felix Wright, Cody Risien, Mark Harper, Sammy Martin, Don Beebe, Gregory Scales, Byron Evans, Paul Gruber, Terry Orr, Shane Collins, Ron Middleton, Mark Schlereth, Kelly Goodburn, David Gulledge, Ed Simmons, Matt Elliott, Joe Jacoby, Sidney Johnson, Kurt Gouveia, Ravin Caldwell, Mark Rypien, James Jenkins, Johnny Thomas, Eric Williams, Don Warren, Jeff Bostic, Todd Bowles, Ray Brown, Jason Buck, Earnest A. Byner, Desmond Howard, Anthony Johnson, Brian Mitchell, Ricky Sanders and Paul Siever. Counsel for the Philadelphia

Eagles was also present. At the hearing, all persons who requested the opportunity to speak were permitted to do so.

FN18. See infra s I (setting forth details of notice provided to the class).

FN19. Despite objections to its jurisdiction based on the filing of various interlocutory appeals of the April 30, 1993 order, the court further concluded that it has jurisdiction to determine the present motions. Id. at 3-4; see infra note 20 (listing players who asserted jurisdictional objections as a result of the appeals); see infra s XII (discussing that issue).

As of July 7, 1993, the date of the final settlement hearing, twenty-eight players, all of whom had previously objected to the terms of the original Stipulation and Settlement Agreement, filed objections to the motions currently before the court. [FN20] One defendant, the Philadelphia Eagles, has filed objections to both the original settlement and the pending motions.

FN20. Those players are: Carl Lee, Mark Dusbabek, Audray McMillian, Felix Wright, Cody Risien, Mark Harper, Sammy Martin, Don Beebe, Gregory Scales, Sean Jones, Eric Allen, Leslie O'Neal, Eric Sanders, Ken Norton, Jr., Curtis Duncan, Patrick Hunter, William C. Matthews, Cris Dishman, Lomas Brown, Neil Smith, Van

Waiters, Broderick Thompson, Jerry Ball, Wilber Marshall, Paul Gruber, Byron Evans, Maurice Hurst and John Fourcade. Counsel for a group of twenty-seven additional players appeared at the preliminary hearing on June 1, 1993, and objected to the court's jurisdiction to entertain the present motions. As the court noted in its order granting preliminary approval on June 2, 1993: As a result of the filing of appeals of the court's order of April 30, 1993, various other players object to the court's jurisdiction, specifically Terry Orr, Shane Collins, Ron Middleton, Mark Schlereth, Kelly Goodburn, David Gulledge, Ed Simmons, Matt Elliott, Joe Jacoby, Sidney Johnson, Kurt Gouveia, Ravin Caldwell, Mark Rypien, James Jenkins, Johnny Thomas, Eric Williams, Don Warren, Jeff Bostic, Todd Bowles, Ray Brown, Jason Buck, Earnest A. Byner, Desmond Howard, Anthony Johnson, Brian Mitchell, Ricky Sanders and Paul Siever. (See Letter to court from Robert A. Brunig dated May 28, 1993.) At the hearing, counsel for those players renewed the jurisdictional objections and raised other grounds for objection. White v. National Football League, Civ. No. 4-92-906, slip op. at 5 n. 5 (D.Minn. June 2, 1993). Counsel for those players, however, did not file a notice of intent to appear at the hearing on July 7, 1993, filed no further objections, and did not appear at the final settlement hearing. Thus, it is unclear whether those twenty-seven players continue to object to the pending motions.

Despite published notice, and notice mailed to those class members most likely to be affected by the proposed changes to the Settlement Agreement, see infra Section I (detailing notice), as of the date of this order, August 19, 1993, there have been no new persons filing objections to the pending motions. Moreover, on June 18, 1993, the NFLPA announced the ratification of the new Collective Bargaining Agreement, which incorporates almost verbatim the player movement rules contained in the amended version of the Settlement Agreement. The vast majority of the players who voted, more than ninety-six percent, supported the ratification of the new Collective Bargaining Agreement. [FN21] Supplemental Declaration of Douglas F. Allen P 2 (July 1, 1993) (hereinafter "Allen Supp.Decl.").

FN21. On June 18, 1993, the NFLPA announced that the players had ratified the new Collective Bargaining Agreement by a vote of 788 to 34. Allen Supp.Decl. P 2. Since that date, the NFLPA has received nine additional votes in support of ratification. Id.

On July 7, 1993, the court conducted the final settlement hearing. All persons who wished to speak were permitted to do so, and the court heard argument both in support of and against the amended Settlement Agreement and the requested findings. [FN22] The court also requested that any proposed findings concerning the pending motions be submitted by July 14, 1993, and considered all

such submissions. [FN23]

FN22. The following objectors were represented at the hearing on July 7, 1993: Carl Lee, Mark Dusbabek, Audray McMillian, Felix Wright, Cody Risien, Mark Harper, Sammy Martin, Don Beebe, Gregory Scales, Sean Jones, Eric Allen, Leslie O'Neal, Eric Sanders, Ken Norton, Jr., Curtis Duncan, Patrick Hunter, William C. Matthews, Cris Dishman, Lomas Brown, Neil Smith, Van Waiters, Broderick Thompson, Jerry Ball, Wilber Marshall, Paul Gruber, Byron Evans and the Philadelphia Eagles. Counsel for Mr. Marshall, Mr. Gruber and the Philadelphia Eagles were the only representatives who spoke at that hearing.

FN23. Proposed findings of fact and conclusions of law concerning the pending motions were submitted on behalf of: Carl Lee, Mark Dusbabek, Audray McMillian, Felix Wright, Cody Risien, Mark Harper, Sammy Martin, Don Beebe, Gregory Scales, the named plaintiffs, all of the defendants except the Philadelphia Eagles, the Philadelphia Eagles, Maurice Hurst, John Fourcade, Sean Jones, Eric Allen, Leslie O'Neal, Eric Sanders, Ken Norton, Jr., Curtis Duncan, Patrick Hunter, William C. Matthews, Cris Dishman, Lomas Brown, Neil Smith, Van Waiters, Broderick Thompson and Jerry Ball.

As noted in its order of April 30, 1993, the court has

an extensive record on which to evaluate the fairness, reasonableness and adequacy of both the original Settlement Agreement, and the motions currently pending. That record includes the voluminous submissions in the present action, and the court's personal knowledge as a result of presiding over both the present action and its predecessors for more than five years, [FN24] including the ten-week jury trial in McNeil. [FN25] White, 822 F.Supp. at 1397.

FN24. As set forth in its order of April 30, 1993: the court has full access to, and intimate familiarity with, the records in Powell, McNeil, Five Smiths v. National Football League, 788 F.Supp. 1042 (D.Minn. filed 1990), National Football League v. National Football League Players Ass'n & Hilton, Civ. No. 4-91-877 (D.Minn. filed Oct. 15, 1991), and Jackson v. National Football League, 802 F.Supp. 226 (D.Minn. filed Sept. 14, 1992). Of particular help to the court is the record in McNeil, which includes the McNeil trial transcript, comprising more than 8400 pages, and the evidence received in McNeil, which includes over 400 trial exhibits. The testimony and evidence received in the foregoing cases has also been supplemented by arguments of counsel and numerous legal memoranda. White, 822 F.Supp. at 1397.

FN25. The McNeil jury found that the Plan B right of first refusal/compensation rules (1) had "a substantially harmful effect on competition in the relevant market for the

services of professional football players"; (2) "significantly contribute[d] to competitive balance in the NFL"; and (3) were "more restrictive than reasonably necessary to achieve ... competitive balance." See McNeil, 1992 WL 315292, at *1 (special verdict form). The jury further found that all plaintiffs had suffered antitrust injury, although it awarded damages to only four of the eight plaintiffs in the total amount of $543,000, before trebling. See id.; infra note 39 (detailing damages awarded). The parties reached a tentative global settlement before the court had entered final judgment in McNeil. Because defendants were unable to appeal from the McNeil verdict, neither the liability nor damages issues raised in McNeil have been finally resolved. In its order of April 30, 1993, the court found that the McNeil case presented significant issues for appellate review, including the scope of the nonstatutory labor exemption, the application of the rule of reason under Section 1 of the Sherman Act, and the jury instructions regarding burden of proof and antitrust injury. White, 822 F.Supp. P 6.2(a), at 1418. The court further noted the existence of significant uncertainties concerning the nature and extent of damages that plaintiffs or other class members might be able to recover as a result of the operation of Plan B: In McNeil, the only Plan B case tried to date, the jury made clear that such damages are difficult to prove, awarding monetary damages to only four of the eight plaintiffs despite the fact that it found all eight had suffered economic injury as a result of the Plan B rules. Id. at 1399; see also Jackson v.

National Football League, 802 F.Supp. 226, 231 (D.Minn.1992) (many economic injuries alleged by professional football players "may be impossible to quantify in monetary terms", a difficulty "further confirmed by the jury's [verdict] in McNeil ").

That record has provided the court with: a comprehensive view of the workings of the NFL and the employment practices of its member clubs, the collective bargaining and labor relations history within the NFL, the nature and effects of the right of first refusal/compensation rules and other player-related rules, the terms of the proposed settlement and the nature and likely effect of the proposed NFL player rules. Id. at 1399. [FN26]

FN26. On June 3, 1993, the court ordered that the records in Powell, McNeil and Jackson be incorporated into the record of the present case. White v. National Football League, Civ. No. 4-92-906, slip op. at 3 (D.Minn. June 3, 1993).

Against that background, and for the reasons stated herein, the court grants the motion to amend the Stipulation and Settlement Agreement, grants final approval of the amended version of the Stipulation and Settlement Agreement, overrules all objections to the pending motions, denies plaintiffs' motion to sanction the Philadelphia Eagles, grants the motion for further factual findings, incorporates

all of the findings previously set forth in its order of April 30, 1993, and makes additional findings as set forth below.

I. PROPER NOTICE WAS GIVEN TO THE CLASS OF THE PROPOSED AMENDMENTS, THE MOTION TO GRANT FINAL APPROVAL OF THE AMENDED SETTLEMENT AGREEMENT AND THE REQUESTED FINDINGS CONCERNING THE NFLPA AND THE NONSTATUTORY LABOR EXEMPTION

1.1 The court has evaluated whether the terms of the amended Settlement Agreement and the requested findings are fair, reasonable and adequate using the two-stage procedure suggested in the Manual for Complex Litigation, s 30.44, at 241-42 (2d ed. 1985). [FN27] The first stage involved the court's preliminary determination of whether the amended Settlement Agreement and the requested findings fell within the range of possible approval, and whether class members should be notified of the pending motions, and the date of a final hearing on those motions. On June 2, 1993, the court determined that the amended version of the Settlement Agreement and the requested factual findings fell within the range of possible approval, and that class members should be notified of the motions and the date on which the court would conduct a final settlement hearing, July 7, 1993. White v. National Football League, Civ. No. 4-92-906, slip op. at 6-7 (June 2, 1993).

FN27. The court also followed that procedure for

purposes of determining whether the original Stipulation and Settlement Agreement was fair, reasonable and adequate. See White, 822 F.Supp. P 1.1, at 1399.

The second stage of the court's evaluation process involved sending notice to members of the class. The proposed amendments to the Settlement Agreement relate solely to various aspects of the new player movement system in the NFL; none of the proposed changes affects the amount of any settlement payment due to class members under the terms of the original Settlement Agreement. Thus, only those class members who continue to play for NFL clubs will likely be affected by the proposed amendments. The court therefore determined that plaintiffs should mail a copy of the approved notice to the following class members: (1) all players who were on the Active List of an NFL club at the end of the 1992 NFL season; (2) all rookies who were selected by an NFL club in the 1993 college draft; and (3) all other players, including rookie free agents, who have signed, since March 1, 1993, a contract with an NFL club for the 1993 NFL season. Id. at 6-8. The notice described the amendments to the Settlement Agreement and the requested findings, allowed class members to file objections to the pending motions prior to the final settlement hearing and provided that objectors would have an opportunity to appear and be heard at the final hearing. Id. Appendix A.

The court further ordered that: A Summary Notice

that is substantially similar to the one used for the original Stipulation and Settlement Agreement ... shall be published in one issue of an appropriate publication as soon as practicable after the date of entry of this order Id. at 7 (citation omitted).

1.2 As previously determined in the June 2, 1993, order granting preliminary approval, the court finds that the foregoing notice of the requested findings of fact, the proposed amendments to the Settlement Agreement and the final hearing on July 7, 1993, is proper and adequate as to timing, content and means of transmission. Id. (such notice is "found to be due, adequate and sufficient notice, and the best notice practicable under the circumstances").

1.3 With respect to the pending motions and the final hearing on July 7, 1993, the following notice was given:

(a) On June 4, 1993, court-approved notice of the July 7, 1993, hearing and summary of the terms of the proposed changes was mailed by first-class mail, postage prepaid, to all persons whom the parties have been able to determine, through their best efforts, are class members who were on the Week 17 Roster List of an NFL Club at the end of the 1992 NFL season, and with respect to whom the parties have been able to obtain a current or last-known mailing address. Affidavit of Arnold D. Herz of Dissemination of Notice to Class PP 2-3 (June 22, 1993) (hereinafter "Herz Aff.").

(b) On June 9, 1993, court-approved notice of the July 7, 1993, hearing and summary of the terms of the

proposed changes was mailed by first-class mail, postage prepaid, to most of the persons whom the parties have been able to determine, through their best efforts, are class members who had been selected in the 1993 NFL College Draft and/or had signed, between March 1, 1993 and June 7, 1993, a player contract for the 1993 NFL Season ("the rookie class members"), and with respect to whom the parties have been able to obtain a current or last-known mailing address. On June 10 and 11, 1993, the foregoing notice was mailed to the remaining rookie class members. Id. PP 4-6 & n. 1.

(c) Summary Notice substantially similar to that used for the original Stipulation and Settlement Agreement was published in the Sports Section of the June 10, 1993 National Edition of USA Today, a daily newspaper with a circulation of approximately 1,840,000. Id. P 8 & Exh. F.

(d) In addition to the foregoing, the NFLPA gave notice of the proposed changes to numerous class members during meetings that were conducted for purposes of obtaining player ratification of the new Collective Bargaining Agreement. On May 14, 1993, the proposed changes were also discussed during a seminar held by the NFLPA and attended by over one hundred agents who represent professional football players. Cf. Alexander v. National Football League, 1977-2 Trade Cas. (CCH) P 61,370, at 72,989, 1977 WL 1497, at *7 (D.Minn.1977) (circumstances that increase the effectiveness of published notice to professional football players include "the fact that

many class members are represented by agents or attorneys who stay conversant with player- club developments").

(e) Papers in support of the pending motions were served on all persons who had previously objected to the settlement, or their counsel. [FN28] Notice of the preliminary hearing on June 1, 1993, the proposed class notice and the proposed order for preliminary approval were also served on all of those individuals or their counsel. [FN29]

FN28. See supra notes 8-10 (listing persons who had objected to the original Stipulation and Settlement Agreement).

FN29. See supra note 17 (listing objectors whose representatives appeared at the preliminary approval hearing on June 1, 1993).

1.4 Class members were given extensive and proper court-approved notice of the requested factual findings and the proposed amendments to the Settlement Agreement, and had an adequate and reasonable opportunity to formulate and present meaningful objections to the pending motions. Class members received extensive notice of both the terms of the original Stipulation and Settlement Agreement and the final fairness hearing on April 16, 1993. See White, 822 F.Supp. s I, at 1399-1402 (detailing that notice). Persons who filed objections to the original Stipulation and

Settlement Agreement were notified of the pending motions and the date of the preliminary approval hearing. The original objectors had an opportunity to attend that hearing on June 1, 1993, and had nearly three weeks available to prepare and file objections between preliminary approval of the proposed changes on June 2, 1993, and the deadline for filing such objections, June 22, 1993. Class members who received mailed notice of the proposed changes had more than a week to prepare and file any objections, and almost four weeks notice of the date of the final hearing. In addition, almost four weeks were available between the publication of the Summary Notice in the June 11, 1993, edition of USA Today, and the final hearing date.

1.5 The court finds that the mailed and published notices clearly satisfy both Rule 23 and due process requirements. Overall, approximately 2,524 notices of the proposed changes were mailed to those class members most likely to be affected by the changes. Herz Aff. PP 2-7. Of those, a total of 99, or less than four percent, were returned by the Postal Service as undeliverable. Of the 99 returned notices, 91 were re-mailed to newly located addresses. Id. P 7. [FN30] See Grunin v. International House of Pancakes, 513 F.2d 114, 121 (8th Cir.) ("individualized notice by mail to the last known address [is] the 'best notice practicable' in a class action contest") (quoting Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 174-77, 94 S.Ct. 2140, 2151-2152, 40 L.Ed.2d 732 (1974)), cert. denied, 423 U.S. 864, 96 S.Ct. 124, 46 L.Ed.2d 93 (1975).

FN30. The NFLPA tried to obtain the addresses of all persons whose notices were returned as undeliverable. Herz Aff. P 7.

1.6 The court finds that the mailed and published notices of the July 7, 1993, hearing were reasonably calculated, under all of the circumstances of NFL football, to apprise class members of the pending motions and afford them an opportunity to object. See, e.g., Reynolds v. National Football League, 584 F.2d 280, 285 (8th Cir.1978); Grunin, 513 F.2d at 121 ("the mechanics of the notice process are left to the discretion of the court subject only to the broad 'reasonableness' standards imposed by due process") (citations omitted). The mailed and published notices fairly, reasonably and adequately conveyed to class members the requisite information concerning the proposed changes, and afforded a reasonable time in which class members could formulate and file their objections, if any, to the pending motions. See id.; cf. 2 Herbert Newberg & Alda Conte, Newberg on Class Actions s 11.57, at 11-140 (3d ed. 1992) ("the period from receipt of notice until the actual settlement hearing is often 30 days or less").

1.7 The mailed notices also stated that class members could obtain more detailed information concerning the proposed amendments and the present litigation from the court; the published notice provided that upon objection, further information could be obtained from class counsel. See Grunin, 513 F.2d at 122 ("[c]lass members are not

expected to rely on the notices as a complete source of settlement information") (citation omitted).

1.8 Based on the foregoing and all other evidence before the court, the court finds that pursuant to the requirements of Rule 23 and due process, proper notice of the requested factual findings and the terms of the amended Settlement Agreement has been given to class members. Accordingly, the court overrules any objections to the adequacy of the notice provided to the class.

II. A DEFINABLE CLASS EXISTS THAT SATISFIES THE REQUIREMENTS OF FEDERAL RULE OF CIVIL PROCEDURE 23(b)(1)

2.1 The court incorporates the findings previously set forth in Section II of its order of April 30, 1993, and supplements those findings as follows. See White, 822 F.Supp. s II, at 1402-10.

2.2 After the parties reached agreement on the terms of the original Stipulation and Settlement Agreement, class counsel and the NFLPA, in the course of negotiating the terms of the new Collective Bargaining Agreement, were able to obtain further concessions from the NFL defendants which provide substantial additional benefits to the class. See infra P 6.4 (setting forth additional benefits to class). The court finds that the proposed amendments reflecting those concessions, the NFLPA's negotiation of the new Collective Agreement and class counsel's participation in those negotiations further demonstrate that the settlement has been the product of arm's length negotiations, and that class

counsel have vigorously and adequately represented the interests of all class members. See Paxton v. Union Nat'l Bank, 688 F.2d 552, 562-63 (8th Cir.1982) (setting forth test by which to determine adequacy of representation), cert. denied, 460 U.S. 1083, 103 S.Ct. 1772, 76 L.Ed.2d 345 (1983).

2.3 The court also finds that the NFLPA's consultation in the negotiation of the original Settlement Agreement, the proposed amendments and the requested findings has substantially contributed to class counsel's ability to represent all members of the class and to negotiate a fair, reasonable and adequate settlement. The overwhelming ratification of the new Collective Bargaining Agreement, by a vote of 788 to 34, further confirms that class counsel's representation of the class has not been compromised, and that class counsel and the named plaintiffs have adequately represented all class members. See White, 822 F.Supp. PP 2.12-2.21, at 1404-07 (concluding that the named plaintiffs and class counsel adequately represent the White class).

2.4 Relying on the foregoing findings, and those previously set forth in the order of April 30, 1993, the court reaffirms that a definable class exists that satisfies the requirements of, and should be finally certified pursuant to, Federal Rule of Civil Procedure 23(b)(1). Cf. Reynolds, 584 F.2d at 283 (prior to Shutts, finding that certification of a 23(b)(1) class is appropriate in cases involving antitrust challenges to a system of player restraints because

"[a]ntitrust violations involving the rules and practices governing professional players may require the imposition of broadly based remedies").

III. DUE PROCESS DOES NOT REQUIRE THAT ABSENT CLASS MEMBERS BE GIVEN THE RIGHT TO OPT OUT OF THE WHITE SETTLEMENT CLASS

3.1 In its order of April 30, 1993, the court concluded "that due process does not require that absent class members be afforded an opportunity to opt out of the White class settlement." White, 822 F.Supp. P 3.6, at 1412. In making this determination, the court found that the Supreme Court's decision in Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985) does not preclude the certification of a mandatory class pursuant to Federal Rule of Civil Procedure 23(b)(1) in cases where claims for injunctive relief predominate over any claims for monetary damages. White, 822 F.Supp. P 3.2, at 1410-11. [FN31]

FN31. A number of players objected to the original settlement based on the contention that under Shutts, and its progeny, minimum due process requires that absent class members be afforded an opportunity to opt out of all class actions that involve claims for money damages. The court rejected that contention, and determined that: Shutts does not purport to make every mandatory non-opt-out class action unconstitutional. In Shutts, the Supreme Court determined that where a class action concerns claims

"wholly or predominantly for money judgments", absent class members must be given notice, an opportunity to oppose the class settlement and an opportunity to opt out. The Supreme Court, however, did not address class actions in which the claims for injunctive relief plainly predominate, and specifically stated that its holding was: limited to those class actions which seek to bind known plaintiffs concerning claims wholly or predominantly for money judgments. We intimate no view concerning other types of class actions.... White, 822 F.Supp. P 3.2(a), at 1410 (quoting Shutts, 472 U.S. at 811 n. 3, 105 S.Ct. at 2974); see also In re Jackson Lockdown/MCO Cases, 107 F.R.D. 703, 713-14 (E.D.Mich.1985) (distinguishing Shutts for purposes of certifying class action involving claims for monetary relief under Rule 23(b)(1)); 7B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure s 1789, at 255 (2d ed. 1986) (noting Supreme Court's explicit limitation); 1 Herbert Newberg & Alda Conte, Newberg on Class Actions s 1.19, at 1-48 (3d ed. 1992) (Shutts was silent concerning the validity of classes certified under Rule 23(b)(1) and "[i]t is highly unlikely that the Supreme Court would have invalidated [that] rule[ ] without expressly doing so"). The court also concluded that the Ninth Circuit's decision in Brown v. Ticor Title Ins. Co., 982 F.2d 386 (9th Cir.1992), does not alter the Shutts constitutional standard. In reaching that conclusion, the court noted that the Brown decision expressly recognized that "Shutts is limited to claims 'wholly or predominantly

for money judgments.' " White, 822 F.Supp. P 3.5, at 1412 (quoting Brown, 982 F.2d at 392 (quoting Shutts, 472 U.S. at 811 n. 3)). This court further found that the present settlement was distinguishable from the settlement challenged in Brown because Brown involved class claims that were "wholly or predominantly" for money damages, yet the challenged settlement provided no damages recovery but only injunctive relief. Id.

3.2 The court further determined that the present case is one "in which the plaintiff class's claims for structural, injunctive relief 'predominate' over its claims for damages." Id. P 3.3, at 1411. The court relied on various factors to support this conclusion, including: (a) the repeated motions for preliminary and permanent injunctive relief filed by the plaintiffs in Powell, McNeil, Jackson, and White; (b) the need to provide a meaningful class remedy by preventing future injuries and ongoing litigation through the implementation of broad structural injunctive relief; (c) the record, and particularly plaintiffs' testimony, in McNeil; (d) the repeated statements of class counsel, other player representatives, and defendants and their representatives emphasizing the necessity for major restructuring of player rules affecting the terms and conditions of employment; and (e) the terms of the original Stipulation and Settlement Agreement itself, which devoted 179 pages of the 188-page document to redefining the rules and practices governing player employment in the NFL. Id.

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 9105 Sunset Boulevard, West Hollywood, California 90069; that on April 18, 1995, I served the within *Appendix For Petition For Writ of Certiorari (Volume I of IV)* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on April 18, 1995, Los Angeles, California.

Betty J. Malloy
(*Original Signed*)

94 1749 APR 20 1995

OFFICE OF THE CLERK

No. _____

IN THE

Supreme Court of the United States

APRIL TERM, 1995

SEAN JONES, *et al.*,

Petitioners,

v.

REGGIE WHITE, *et al.*,

Respondents;

NATIONAL FOOTBALL LEAGUE, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

APPENDIX FOR PETITION FOR WRIT OF CERTIORARI
VOLUME II OF IV

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TABLE OF CONTENTS

Byron Evans, et al. v. National Football League, et al.
(Nos. 93-/3375/3381/3382/3403/3415MNMI)
United States Court of Appeals for the Eighth Circuit (January 20, 1995) Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc 1

Reggie White, et al. v. National Football League, et al.
(Nos. 93-3375, 93-3381, 93-3382, 93-3403, 93-3415)
United States Court of Appeals for the Eighth Circuit (December 6, 1994) Opinion of the Court 2

Reggie White, et al. v. National Football League, et al.
Civ. No. 4-92-906, United States District Court for the District of Minnesota (August 20, 1993) Order 18

Reggie White, et al. v. National Football League, et al.
Civ. No. 4-92-906, United States District Court for the District of Minnesota (August 20, 1993) Final Consent Judgment 26

Reggie White, et al. v. National Football League, et al.
Civ. No. 4-92-906, United States District Court for the District of Minnesota (August 19, 1993) Order 34

Reggie White, et al. v. National Football League, et al.
Civ. No. 4-92-906, United States District Court for the District of Minnesota (April 30, 1993) Order 170

The proposed amendments also focus on the restructuring of the rules and practices governing player employment. Five of the six proposed amendments modify provisions of the Settlement Agreement that concern structural changes to the NFL arising from the injunctive relief afforded to class members. See infra Section IV (detailing proposed amendments). As previously discussed, none of the proposed amendments affect the monetary relief provided pursuant to the terms of the original Stipulation and Settlement Agreement. See supra P 1.1; White, 822 F.Supp. PP 4.9-4.10, at 1414-15 (summarizing terms of monetary settlement). The proposed amendments thus provide further support for the court's determination that class members' claims for injunctive relief predominate over the claims for monetary damages.

3.3 In the order of April 30, 1993, the court also determined that opt-out rights are not constitutionally required in cases where sufficient alternative procedural safeguards have been employed. Id. P 3.4, at 1411-12; see Williams v. Burlington Northern, Inc., 832 F.2d 100, 104 (7th Cir.1987) (although plaintiff did not have the right to opt out, court "provided [plaintiff] with the equivalent due process protection that would be accorded to a Rule (23)(b)(3) class member"), cert. denied, 485 U.S. 991, 108 S.Ct. 1298, 99 L.Ed.2d 508 (1988); cf. Robertson v. National Basketball Ass'n, 556 F.2d 682, 685-86 (2d Cir.1977) (discussing due process rights of mandatory class members prior to Shutts). Although absent class members

do not have the right to opt out, the court concluded that the requirements of due process had been satisfied for purposes of approving the original Stipulation and Settlement Agreement because class members had been: (1) adequately represented by the named plaintiffs; (2) adequately represented by capable and experienced class counsel; (3) provided with adequate notice of the proposed settlement; (4) given an opportunity to object to the settlement; and (5) assured that the settlement will not be approved unless the court, after analyzing the facts and law of the case and considering all objections to the proposed settlement, determines it to be fair, reasonable and adequate. Id. P 3.4, at 1412 (citing Williams, 832 F.2d at 104; Nottingham Partners v. Dana, 564 A.2d 1089, 1100-01 (Del.1989)).

Examining those factors, the court determines that absent class members have again been adequately represented by named plaintiffs and class counsel, see supra s II, have been afforded adequate notice of the pending motions and have been given a meaningful opportunity to object to the motions. See supra s I. In addition, the court has followed the same procedure in assessing the fairness, reasonableness and adequacy of the amended Settlement Agreement and the requested factual findings. Finally, the court has agreed to retain jurisdiction over this action during the express term of the Settlement Agreement, and thus the court will be in a position to ensure that all class members' interests will be protected throughout the life of the settlement. See White, 822 F.Supp. at 1437. The court

therefore concludes that class members' due process rights have been satisfied for purposes of evaluating the present motions, and the final approval of the amended Settlement Agreement.

3.4 Various persons object to the pending motions because the proposed amendments do not alter the Settlement Agreement to provide them with the right to opt out of the White class. For the reasons set forth above and in its opinion of April 30, 1993, the court reaffirms that due process does not require that absent class members be afforded an opportunity to opt out of the White class settlement. See id. s III, at 1410-12. Accordingly, the court overrules any objections to the certification of a mandatory class.

IV. SUMMARY OF THE PROPOSED AMENDMENTS TO THE STIPULATION SETTLEMENT AGREEMENT [FN32]

FN32. For a summary of the terms of the original Stipulation and Settlement Agreement, see White, 822 F.Supp. s IV, at 1412-16.

A. Amendments Concerning Structural Relief

4.1 Free Agency. Proposed Amendment No. 1 modifies the veteran free agency rules concerning Franchise and Transition Players.

(a) Franchise Player Provisions

Under the original version of the Stipulation and

Settlement Agreement, a team was permitted to designate one Franchise Player per year by tendering an offer of a one year contract at a salary amounting to the greater of: (1) the average of the salaries from the prior season of the five highest paid players at the designated player's same position; or (2) a twenty percent increase in the designated player's previous year's salary. [FN33] See White, 822 F.Supp. P 4.1(d), at 1413 (detailing Franchise Player provisions under original Settlement Agreement).

FN33. A team thereby obtained exclusive negotiating rights to the Franchise Player, notwithstanding his years of experience.

Under the proposed amendment, any 1993 Franchise Player who had not signed a player contract as of June 14, 1993, had to receive one of the following tenders on June 15, 1993: (1) an upgraded tender for the average of the five largest 1993 salaries for players at his position as of May 6, 1993; or (2) the tender previously provided under the original Settlement Agreement, but in that event the Franchise Player became free to negotiate a player contract with any club subject to a right of first refusal and draft choice compensation of two first round draft picks.

A 1993 Franchise Player will continue to have the right to receive a tender of 120 percent of his prior year's salary, with all other terms of his prior year's contract, including any guarantees and any incentive or performance

bonuses, if he so wishes. If a club withdraws its required tender entirely, as before, a 1993 Franchise Player will be completely free to negotiate and sign a player contract with any club without any right of first refusal for his prior club, or any signing period.

In future years of the Settlement Agreement, any player who is designated as a Franchise Player will receive one of two potential tenders under the proposed amendment: (1) an upgraded tender for the average of the five largest salaries for players at his position as of the last day of the Restricted Player signing period for that year (which is approximately May 1, 1994, for 1994 Franchise Players); or (2) a tender for the average of the five largest salaries for players at his position as of the prior year, but in that event the player will be free to negotiate a player contract with any club subject to a right of first refusal and draft choice compensation of two first round draft picks.

In future years of the Settlement Agreement, a Franchise Player will continue to have the right to receive a tender of 120 percent of his prior year's salary, with all other terms of his prior year contract, including any guarantees and any incentive or performance bonuses, if he so wishes. As before, if a club withdraws its required tender entirely, a Franchise Player will be completely free to negotiate and sign a player contract with any club without any right of first refusal for his prior club, or any signing period.

(b) Transition Player Provisions

Under the original version of the Settlement Agreement, in the first year of the Agreement, each team was permitted to designate two Transition Players by tendering an offer of a one year contract at a salary amounting to the greater of (1) the average of the salaries of the ten highest paid players at the designated player's same position, or (2) a twenty percent increase in the designated player's previous year's salary. [FN34] See White, 822 F.Supp. P 4.1(e), at 1413 (summarizing Transition Player provisions under the original Settlement Agreement).

FN34. A team thereby obtained a right of first refusal with respect to the Transition Player, notwithstanding his years of experience. In both the second and final year of the Settlement Agreement, each team may designate one Transition Player. See White, 822 F.Supp. P 4.1(e), at 1413.

Under the proposed amendment, any 1993 Transition Player who had not signed a player contract as of June 14, 1993, was to receive either an upgraded tender for the average of the ten highest 1993 salaries for players at his position as of May 6, 1993, or, if he did not receive the upgraded tender, the player became free to negotiate a player contract with any club without any right of first refusal for his prior club.

A 1993 Transition Player will continue to have the right to receive a tender of 120 percent of his prior year's

salary, with all other terms of his prior year's contract, including any guarantees and any incentive or performance bonuses, if he so wishes. As under the original version of the Settlement Agreement, if a club withdraws its required tender entirely, a 1993 Transition Player will be completely free to negotiate and sign a player contract with any club without any right of first refusal for his prior club, or any signing period.

4.2 College Draft. The proposed amendments related to expansion, as set forth in Proposed Amendment No. 2, modify Article IV of the Stipulation and Settlement Agreement, the College Draft provision, to provide that any expansion club may be allocated additional special draft selections in the drafts held prior to each of the first three seasons in which the expansion club will participate in regular league play, up to a maximum of one additional special draft selection for each expansion club in each round of the draft in each such year.

4.3 Entering Player Pool. Under the proposed amendments to the Stipulation and Settlement Agreement, the entering player pool, and the rookie allocation for each expansion team, will be increased to account for the additional special draft selections that may be allocated to expansion teams. See supra P 4.2 (noting additional draft selections provided).

4.4 Salary Cap. Various amendments will impact the Salary Cap provisions of the Settlement Agreement. See White, 822 F.Supp. PP 4.3-4.5, at 1413-14 (summarizing

Salary Cap provisions under the original Settlement Agreement). Proposed Amendment No. 4 involves a technical change in the mechanism for making adjustments to the Salary Cap in the event that player benefits unexpectedly increase as a percentage of Defined Gross Revenues at a time when the Salary Cap is in effect. Under the terms of the new Collective Bargaining Agreement, the NFLPA has a right to: (1) contest the NFL's Projected Benefits Costs, see Collective Bargaining Agreement, art. XLVI, s 4 (May 6, 1993); and (2) reduce player benefit payments to a level not less than seven percent of Projected Defined Gross Revenues. Id. s 1. This proposed amendment provides for an immediate increase in the amount of money available under the Salary Cap for players' salaries in the event that projected benefits costs are reduced pursuant to the terms of the new Collective Bargaining Agreement.

As a result of the settlement in the licensing litigation, [FN35] under Proposed Amendment No. 6, the calculation of Defined Gross Revenues in the Settlement Agreement may be reduced by up to $5 million per year to reflect payments that the NFLPA might receive from the NFL defendants over the next seven years. See infra P 4.9 (setting forth details of this amendment).

FN35. See White, 822 F.Supp. P 4.13, at 1415-16 (detailing licensing litigation); infra note 37 (listing the licensing cases).

Proposed Amendment No. 2 will modify the Settlement Agreement so that any bonuses that are paid to veteran players drafted by expansion clubs will not be counted under the Salary Cap. See infra P 4.6 (detailing expansion club bonuses for veteran players).

B. Monetary Relief

4.5 The proposed amendments to the Stipulation and Settlement Agreement do not change the monetary relief provided to class members under the terms of the original agreement. See White, 822 F.Supp. PP 4.9-4.10, at 1414-15 (summarizing terms of monetary relief provided under the original Stipulation and Settlement Agreement).

C. Expansion Related Amendments

4.6 Other amendments, referred to collectively as Proposed Amendment No. 2, relate to NFL expansion. First, each expansion club may be allocated additional special draft selections in the drafts held prior to each of the first three seasons in which the expansion clubs will participate in regular league play, up to a maximum of one additional special draft selection for each expansion club in each round of the draft in each such year. See supra P 4.2. Second, the entering player pool, and the rookie allocation for each expansion team, will be increased to account for these additional special draft selections. See supra P 4.3. Third, the Collective Bargaining Agreement provides that each veteran player drafted by an expansion club will receive a relocation bonus of between $10,000 and $25,000. Collective Bargaining Agreement, art. XXXI, s 4. Under

the proposed amendments to the Settlement Agreement, such bonuses will not be counted under the Salary Cap. See supra P 4.4.

D. Proposed Amendment to Clarify Offer Sheet Terms

4.7 Proposed Amendment No. 3 clarifies the rules concerning what type of conditional, that is variable or calculable, salary a club must match in order to retain a player subject to a right of first refusal. The amendment specifically sets forth what types of conditional salary must be matched, thereby resolving the uncertainty created by a recent arbitration decision. [FN36]

FN36. An arbitrator recently determined that an offer sheet extended to Transition Player Will Wolford, which conditioned his salary on the salary paid to the highest paid offensive player on the offering team, with certain exceptions, was within the definition of "Principal Terms" under the original Settlement Agreement. Accordingly, that offer had to be matched by Mr. Wolford's former team, the Buffalo Bills, even though matching the offer might cost the Bills more than the new team. The arbitrator also indicated that his written opinion, which has not yet been issued, would make clear what other types of conditional salary might not, under certain circumstances, constitute Principal Terms of an offer sheet. That decision created uncertainty about the interpretation of the offer sheet provisions in the original Settlement Agreement.

E. Proposed Amendment Concerning the NFL's Right to Terminate the Settlement Agreement

4.8 Proposed Amendment No. 5 extends the NFL's right to terminate the Settlement Agreement in the event that players fail to ratify a new collective bargaining agreement in the period between the date on which the court enters the final consent judgment, and the end of the 1993 NFL season.

F. Proposed Amendment to Change the Calculation of Defined Gross Revenues as a Result of the Settlement of the Licensing Litigation

4.9 At the time the court granted final approval to the original Settlement Agreement, various cases involving licensing rights were also in the process of being settled. [FN37] Since that time, the parties have reached a final settlement of those cases, under which the NFLPA is to receive at least $5 million a year over the next seven years in additional licensing revenues. As part of that agreement, the calculation of Defined Gross Revenues under the present Settlement Agreement is to be altered, pursuant to Proposed Amendment No. 6, to allow a reduction of up to $5 million a year to reflect any such payments made by defendants, thereby avoiding a situation where defendants would be forced to pay those revenues twice.

FN37. In one of the cases, NFLPA v. NFL Properties, Inc., No. 90-CV-4244 (S.D.N.Y.), the NFLPA sought damages for antitrust violations and tortious

interference with existing NFLPA group licensing authorizations. Other licensing cases were to be settled in the context of the global settlement, including: NFLPA v. Roby, Case No. 92-09092(15) (Cir.Ct.Broward Cty.Fla.); NFLPA v. Carrier, Case No. 92 CH 3281 (Cir.Ct.Cook Cty.Ill.); NFLPA v. Fulcher, Case No. 92-CI-00604 (Kenton Cir.Ct.Ky.); NFLPA v. Clayborn, Docket No. 92-00984 (Norfolk Sup.Ct.Mass.); NFLPA v. Golic, Docket No. C123-92 (Sup.Ct.Bergen Cty.N.J.); NFL Properties, Inc. v. Hi-Pro Marketing, No. 92 Civ. 1456, 1992 WL 204370 (S.D.N.Y.); and Aikman v. AAA Sports, No. 92 Civ. 1457, 1992 WL 204397 (S.D.N.Y.). See White, 822 F.Supp. P 4.13, at 1415-16 & n. 35.

V. STANDARD FOR COURT EVALUATION OF THE AMENDED VERSION OF THE STIPULATION AND SETTLEMENT AGREEMENT AND THE REQUESTED FINDINGS

5.1 The court has evaluated the amended version of the Stipulation and Settlement Agreement and the requested factual findings using the same standard by which it evaluated the original Stipulation and Settlement Agreement. See White, 822 F.Supp. s V, at 1416-17; see also Bridgeman v. National Basketball Ass'n, Civ. No. 87-4001, Transcript at 13 (D.N.J. Sept. 24, 1990) (analyzing whether proposed amendment to the Bridgeman professional basketball settlement agreement "should be approved as fair, reasonable and adequate").

5.2 As the court noted in its order of April 30, 1993: The policy in federal court favoring the voluntary resolution of litigation through settlement is particularly strong in the class action context. White, 822 F.Supp. P 5.1, at 1416 (citing Armstrong v. Board of Sch. Directors, 616 F.2d 305, 312-13 (7th Cir.1980); Holden v. Burlington Northern, Inc., 665 F.Supp. 1398, 1405 (D.Minn.1987)).

5.3 Notwithstanding that policy, Federal Rule of Civil Procedure 23(e) provides that a class action may not be dismissed or compromised without court approval. Under Rule 23(e), the district court has a duty to protect the rights of both absent class members and the named plaintiffs. Grunin, 513 F.2d at 123; Welsch v. Gardebring, 667 F.Supp. 1284, 1289 (D.Minn.1987); 7B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure s 1797, at 340 (2d ed. 1986) ("the purpose of [Rule 23(e)] is to protect the nonparty members of the class from unjust or unfair settlements affecting their rights").

5.4 The evaluation of a class action settlement is committed to the district court's discretion, and will not be overturned except on a showing that the district court clearly abused its discretion. See, e.g., Wiener v. Roth, 791 F.2d 661, 662 (8th Cir.1986) (per curiam); Reynolds, 584 F.2d at 283; Grunin, 513 F.2d at 123; cf. In re Drexel Burnham Lambert Group, Inc., 960 F.2d 285, 292 (2d Cir.1992) (although appellate court "will ordinarily defer to a district court's approval of a class action settlement unless

there is a 'clear showing' that the district court abused its discretion.... [w]here ... the district court simultaneously certifies a class and approves a settlement [the appellate court] will more rigorously scrutinize the district court's analysis of the fairness, reasonableness and adequacy of both the negotiation process and the proposed settlement"), cert. dismissed, --- U.S. ----, 113 S.Ct. 1070, 122 L.Ed.2d 497 (1993).

Great weight is accorded the district court's views because the judge: 'is exposed to the litigants, and their strategies, positions and proofs. [The district court judge] is aware of the expense and possible legal bars to success. Simply stated, [the district court judge] is on the firing line and can evaluate the action accordingly.' Reynolds, 584 F.2d at 283 (quoting Grunin, 513 F.2d at 123 (quotation omitted)).

5.5 In making such an evaluation, the district court's primary responsibility is to ensure that the settlement is "fair, reasonable, and adequate." Van Horn v. Trickey, 840 F.2d 604, 606 (8th Cir.1988) (citing Grunin, 513 F.2d at 123); In re Flight Transp. Corp. Sec. Litig., 730 F.2d 1128, 1135 (8th Cir.1984), cert. denied, 469 U.S. 1207, 105 S.Ct. 1169, 84 L.Ed.2d 320 (1985).

5.6 When assessing the fairness, reasonableness and adequacy of the proposed settlement, the court is to examine various factors, the most important of which is the strength of plaintiffs' case on the merits balanced against the benefits to the class provided by the settlement. Van Horn, 840

F.2d at 607; Grunin, 513 F.2d at 124; Holden, 665 F.Supp. at 1407. Other important factors include: 1) the opinions of the participants, including class counsel, class representatives, and class members; 2) the complexity, expense, and likely duration of further litigation; 3) the extent of discovery completed and the stage of the proceedings; and 4) the evidence, if any, that the proposed settlement is the product of fraud and collusion. Holden, 665 F.Supp. at 1407 (citations omitted); accord Armstrong, 616 F.2d at 314; Grunin, 513 F.2d at 124; Welsch, 667 F.Supp. at 1290.

5.7 Moreover, in its evaluation of the class settlement; the court does not have the responsibility of trying the case or ruling on the merits of the matters resolved by agreement. Alexander, 1977-2 Trade Cas. (CCH) P 61,370, at 72,993, 1977 WL 1497, at * 12. Rather, " 'the very purpose of compromise is to avoid the delay and expense of such a trial.' " Id. (quoting Grunin, 513 F.2d at 124).

VI. THE AMENDED STIPULATION AND SETTLEMENT AGREEMENT IS FAIR, REASONABLE AND ADEQUATE

The court will apply the standard set forth in Section V to evaluate the pending motions.

A. The Strengths of Plaintiffs' Case Balanced Against the Benefits of the Settlement

6.1 In weighing the strength of plaintiffs' case against the benefits provided by the amended Settlement

Agreement, the court is not required: to balance the scales with the nicety of an apothecary. The very object of compromise 'is to avoid the determination of sharply contested and dubious issues.' Alexander, 1977-2 Trade Cas. (CCH) P 61,730, at 72,993, 1977 WL 1497, at * 12 (quoting Young v. Katz, 447 F.2d 431, 433 (5th Cir.1971)). The court's analysis generally will not go beyond "an amalgam of delicate balancing, gross approximations, and rough justice." Welsch, 667 F.Supp. at 1290 (quoting City of Detroit v. Grinnell Corp., 495 F.2d 448, 468 (2d Cir.1974)).

6.2 The Risks of Further Litigation. The court concluded in its order of April 30, 1993 that players face numerous risks in going forward with the present litigation, [FN38] including:

FN38. See White, 822 F.Supp. P 6.2, at 1417-18.

(a) The Risk of an Appeal in McNeil

Despite the McNeil verdict, defendants' liability for the imposition of the right of first refusal/compensation rules of Plan B is still subject to appeal, and defendants have indicated their intent to appeal the McNeil verdict on a number of grounds, including the applicability of the nonstatutory labor exemption, defendants' alleged incapacity as a "single entity" to enter into an antitrust conspiracy, the proper application of the rule of reason under Section 1 of the Sherman Act, and the "fact of injury" element of

liability in a private antitrust action.

Should the McNeil judgment be overturned on one or more of those grounds, players would at best be faced with the prospect of retrying, at great expense and after substantial delay, the issue of liability. At worst, if defendants were to prevail on certain issues, such as the nonstatutory labor exemption or the single entity defense, players might be entirely precluded from establishing liability.

Because the McNeil verdict involved only the right of first refusal/compensation rules of Plan B, players would face the additional risk of establishing defendants' liability concerning other challenged restraints, most significantly the college draft and the league's preseason pay policies, with the latter claims burdened by pending counterclaims for substantial sums.

(b) The Difficulty of Establishing Monetary Damages

Even if such liability were established, the McNeil verdict demonstrates that the class members would face substantial obstacles and uncertainties in proving damages. Evaluating the same type of damage issues presented here, the McNeil jury awarded no damages to four of the eight plaintiffs, and the four other plaintiffs received far less than they had sought, despite plaintiffs proffering substantial evidence in support of their damage claims. [FN39] Cf. Kapp v. National Football League, 586 F.2d 644, 648 (9th Cir.1978) (player asserting multimillion dollar claim failed to prove that challenged restraint caused any damages).

FN39. The following is a comparison of the damages that plaintiffs' expert, Michael Glassman, calculated for the McNeil plaintiffs versus the actual damages awarded by the jury:

Plaintiff	Actual Damages*	Estimated Damages Plan B Model	USFL Yardstick
Mark Collins	$178,000	$ 396,000	$ 387,000
Don Majkowski	0	1,366,000	1,338,000
Tim McDonald	0	681,000	668,000
Freeman McNeil	0	399,000	383,000
Frank Minnifield	50,000	425,000	410,000
Niko Noga	0	190,000	184,000
Dave Richards	240,000	480,000	473,000
Lee Rouson	75,000	100,000	97,000
TOTAL	$543,000	$4,037,000	$3,940,000

*Before trebling.

White, 822 F.Supp. at 1418 n. 37.

In its order of April 30, 1993, the court also observed that plaintiffs'

actual experience in McNeil undermines the expert opinion concerning

damages proffered by various objectors. Id.

Finally, after presiding over the McNeil trial, the court notes that one cannot discount the reluctance of a jury to award damages to professional football players, who are readily perceived as successful, highly paid individuals. See Alexander, 1977-2 Trade Cas. P 61,730, at 72,995, 1977 WL 1497, at *16 (damages uncertain because there was "no assurances that class members' claims would be sympathetically viewed by the jury"); Robertson v. National Basketball Ass'n, 72 F.R.D. 64, 69 (S.D.N.Y.1976) (noting the difficulty of trying to convince a jury that professional basketball players, who already earned substantial salaries, should be paid more money).

(c) The Uncertain Scope of Any Injunctive Relief

Even if it were conclusively established that all of the player rules challenged in the present class action violate the antitrust laws, it is uncertain what scope of injunctive relief would be provided to players. If the present case is not settled, players will likely face further litigation concerning the "reasonableness" of some other modified player reservation system adopted by defendants. [FN40]

FN40. As the court observed in its April 30, 1993 order: In McNeil and Jackson, defendants made perfectly clear their intent to impose Plan C, Plan D and so on, until one passed muster. White, 822 F.Supp. at 1418 n. 38.

6.3 The Benefits to the Class. In its order of April 30, 1993, the court determined that the terms of the original Stipulation and Settlement provided class members with substantial benefits, including: (a) A radically modified player reservation system that affords substantial unrestricted free agency for veteran players, and ensures that almost every player with at least five years of experience (four, if a salary cap is in place) will, on contract expiration, have the opportunity to offer his services to other teams. [FN41]

FN41. See White, 822 F.Supp. P 4.1, at 1412-13 (detailing free agency provisions under original Settlement Agreement).

(b) Higher tender requirements before a club can place any restrictions on a player's mobility. For example, in order to invoke the narrow exceptions for Franchise and Transition players, clubs must tender very substantial offers to players, thereby making those players among the highest paid in professional football. (c) Lesser restrictions on players subject to the free agency limitations. (d) A decrease in the number of rookie players subject to the college draft. [FN42]

FN42. Id. P 4.2, at 1413 (detailing college draft provisions).

(e) Substantial league-wide and team minimum guarantees that are to be paid to players in the event a salary cap goes into effect. [FN43]

FN43. Id. P 4.4, at 1414 (describing various guarantees).

(f) Strict anti-collusion provisions with an expedited and comprehensive enforcement mechanism to deter and punish any collusion by defendants. [FN44]

FN44. Id. P 4.7, at 1414 (discussing anti-collusion provisions).

(g) Settlement payments to White class members totalling $115 million. [FN45]

FN45. See id. P 4.10, at 1414-15 (setting forth details of settlement payments).

White, 822 F.Supp. P 6.3, at 1418-20.

The court further noted that players' marketplace experience after the implementation of the player movement rules set forth in the original Settlement Agreement confirmed the substantial benefits to the White class. Id. P 6.4, at 1420.

Since the court's order of April 30, 1993, marketplace evidence further demonstrates the substantial

benefits to class members. For example, the average per year salaries of players who have signed contracts since March 1, 1993, when the new player movement rules first went into effect, have more than doubled, and now exceed $1 million per year. See Affidavit of Jeffrey L. Kessler P 3 (July 1, 1993) (hereinafter "Kessler Aff."). [FN46] As of June 23, 1993, 241 players had entered into new contracts with NFL teams for the 1993 season, 189 of whom were unrestricted players, and 52 were restricted free agents. The average per year salary of those players rose from $469,452 under their prior contracts to over $1,001,257 under their new contracts, an increase of more than 110%. Id. Both restricted and unrestricted free agents have received enormous salary increases, with the per year average salary for unrestricted free agents increasing 102%; per year average salaries for restricted agents increased 185%. Id.

FN46. At the hearing on July 7, 1993, counsel for Wilber Marshall orally moved to strike Mr. Kessler's affidavit of July 1, 1993, on the ground that the affidavit addresses the adequacy of the Settlement Agreement as a whole rather than the proposed amendments thereto. Transcript of Final Fairness Hearing on the Pending Motions at 94-96 (July 7, 1993). As discussed more fully infra, the court is not to review the amendments in isolation but must evaluate the Agreement as a whole. See infra P 7.10. The court therefore denies the motion to strike Mr.

Kessler's affidavit.

In addition, unprecedented player movement continues under the new free agency system. Over 100 players have switched clubs as unrestricted free agents. [FN47] Since March 1, 1993, twenty-one restricted free agents have received offers from other teams, and seven of them have changed employers. Kessler Aff. P 6. Those figures represent a significant improvement over the experience of players restricted under Plan B: during the four years in which Plan B was in effect, only three restricted players received an offer from a competing team, and not one player actually changed teams. Id.; White, 822 F.Supp. at 1427 n. 61 (noting that Plan B effectively prevented any movement by players who were restricted under the Plan).

FN47. Of the 189 unrestricted free agents who have entered into new contracts, 105 have signed with new teams, and 84 have resigned with their former teams. Kessler Aff. P 5.

6.4 Examining the proposed amendments to the Settlement Agreement and the requested factual findings, the court finds that the changes, as a whole, provide substantial additional benefits to class members.

(a) Proposed Amendment No. 1: The Franchise and Transition Player Rules

The first proposed amendment will benefit class members by significantly liberalizing the Franchise and Transition Player rules. See Declaration of Jeffrey L. Kessler PP 6-9 (May 13, 1993) (hereinafter "Kessler Decl."). For players subject to those designations for the current year, the amendment provides that any 1993 Franchise Player who had not signed a player contract as of June 14, 1993, had to receive one of the following tenders on June 15: (1) an upgraded tender of the average of the five highest 1993 salaries for players at his position as of May 6, 1993 (instead of the five highest salaries for the previous season, as provided for under the original version of the Franchise Player rules); or (2) the tender previously required under the original Settlement Agreement, but in that event the player became free to negotiate a player contract with any club, subject to a right of first refusal and draft choice compensation of two first round draft picks (instead of the blanket prohibition against Franchise Player movement under the original version of the rules).

Any 1993 Transition Player who had not signed a player contract as of June 14, 1993, was to receive either an upgraded tender for the average of the ten highest 1993 salaries for players at his position as of May 6, 1993 (instead of the ten highest salaries for the previous season, as provided for under the original version of the Transition Player rules), or, if he did not receive the upgraded tender, the player became free to negotiate a player contract with any club without any right of first refusal for his prior club.

In addition, 1993 Franchise and Transition Players continue to have the right to receive a tender of 120% of their prior year's salary, with all other terms of their prior year's contract, including any guarantees and incentive or performance bonuses. As before, if any of the foregoing tenders is withdrawn, the player will be completely free to negotiate with any team.

Thus, under the first proposed amendment, 1993 Franchise and Transition Players will benefit, either by receiving an upgraded tender reflecting the increased salaries that other players have obtained this year as a result of the introduction of free agency into the marketplace [FN48], or by having greater freedom to negotiate with other clubs.

FN48. This change renders moot any objection that the 1993 Franchise Players will be deprived of any increase in the marketplace for the current year, and will always be one year behind other players for purposes of participating in market-wide salary increases. See White, 822 F.Supp. P 7.13, at 1427 & n. 60 (discussing objection more fully).

In future years of the Settlement Agreement, players who are designated as Franchise Players will similarly benefit under the proposed amendment, either by receiving upgraded tenders or new opportunities to market their services to other teams subject to a right of first refusal and draft choice compensation. See supra P 4.1(a) (detailing

provision as it applies to future years).

The marketplace evidence confirms that Transition and Franchise Players have benefitted significantly under the new free agency system. Of the seventeen designated Transition Players, six signed contracts before June 15, 1993, at a per year average salary increase of over 275%. Kessler Aff. P 7. As a result of the foregoing amendment, eight of the remaining 11 players received increased tenders on June 15, 1993 (based on the average of the top ten salaries at their positions as of May 6, 1993) which guarantee them, on average, a minimum salary increase of 140%. With the exception of kickers and punters, those tenders range from $1,031,917 to $3,574,500. Id.

The Transition Players who did not receive increased tenders as of June 15, 1993, became unrestricted free agents. Two of those players, Michael Brooks and Carl Banks, have signed contracts with new NFL teams, and their yearly averages are significantly greater than the original tenders required for Transition Players at those positions. Id. P 8. For example, Mr. Brooks' new contract represents an average yearly salary increase of 190%. Id.

Recent marketplace evidence also confirms that Franchise Players will benefit by receiving significant salary increases. For example, Wilber Marshall, an objector and the Washington Redskins' designated Franchise Player, recently signed a one year contract with the Houston Oilers for the 1993 season, under which he is to receive a salary of $2.75 million, plus an agreement that the Oilers will not

designate him as a Franchise Player for the 1994 season. Kessler Aff. PP 9-10 & Exh. B; see also Transcript of Final Fairness Hearing on the Pending Motions at 14-15 (July 7, 1993). The Washington Redskins have agreed to pay Mr. Marshall an additional $150,000. Kessler Aff. P 9 & Exh. B. Mr. Marshall's ability to obtain a contract with a new team at a salary more than $1 million greater than his required tender as a Franchise Player confirms the court's prior conclusion, in its order of April 30, 1993, that the "required tenders act merely as a floor and not a ceiling on the designated player's salary." White, 822 F.Supp. P 7.13, at 1427. [FN49]

FN49. An affidavit of class counsel also states that one of the objectors: James "Jumbo" Elliott, an offensive tackle who was designated by the New York Giants as their Franchise Player, received a minimum tender of $1,167,500, which is 91% more than his previous year's salary of $612,000. Supplemental Affidavit of James W. Quinn P 13 (Apr. 12, 1993) (hereinafter "Quinn Supp.Aff."). The affidavit further states that another Franchise Player and objector, Steve Young, is expected: to negotiate a new contract paying him $4 to $5 million per year, even though the required tender at his position (quarterback) is $3,264,000. Id. P 14 (citations omitted).

Based on the foregoing, the court concludes that the proposed amendment concerning the Franchise and

Transition Player rules confers significant additional benefits upon the White class.

(b) Proposed Amendment No. 2: Changes Related to Future NFL Expansion

The court also determines that the proposed amendments concerning expansion, which permit an increase in the number of draft choices for expansion teams and a modification of the Salary Cap, are highly beneficial to class members. The amendments will facilitate expansion, thereby providing more than one hundred new jobs for college and other players. The amendments also benefit class members by modifying the Salary Cap and entering player pool rules to provide more money for drafted and veteran players whose rights are acquired by expansion teams. Kessler Decl. PP 10-12.

(c) Proposed Amendment No. 3: Offer Sheet Clarifications

This amendment clarifies the types of conditional salary in an offer sheet that a player's prior team must match in order to retain that player subject to a right of first refusal. The amendment does not prohibit any type of conditional salary provisions. At the present time, it is unclear whether the change will affect most offer sheets. The court determines that the proposed amendment benefits the class because it resolves the uncertainty created by the Wolford arbitration. See id. P 16; supra note 36. Thus, at the very least, the proposed amendment obviates the need for numerous future arbitrations, prevents additional

uncertainty and delay, and possibly improves the efficiency of the offer sheet process.

(d) Proposed Amendment No. 4: Adjustments in the Salary Cap For Changes in Projected Benefits

This amendment provides a mechanism for making adjustments in the Salary Cap in the event that projected player benefit costs unexpectedly increase as a percent of Defined Gross Revenues at a time when the Salary Cap is in effect. To protect class members, the amendment permits an adjustment in the Salary Cap so that the "Projected Benefits" figure, on which the Salary Cap and Minimum Team Salary are based, may be immediately recalculated to reflect any change in Projected Benefits. The court finds that this amendment clearly benefits class members by preventing increases in benefit costs from holding down the Salary Cap (which takes such projected benefit cost increases into account) to levels that are detrimental to the class. Id. P 18.

(e) Proposed Amendment No. 5: Defendants' Right to Terminate the Settlement Agreement

This amendment provides defendants with the right to terminate the Settlement Agreement in the event that players failed to ratify a new collective bargaining agreement. The amendment will have no impact on class members because the parties reached agreement on a new Collective Bargaining Agreement on May 6, 1993, and the players ratified the new Agreement as of June 18, 1993.

(f) Proposed Amendment No. 6: Concerning the

Calculation of Defined Gross Revenues as a Result of the Settlement of the Licensing Litigation

This amendment permits a reduction of up to $5 million a year in the calculation of Defined Gross Revenues to reflect the amount that defendants may be required to pay to the NFLPA pursuant to the terms of the settlement of the licensing litigation. This amendment also benefits class members. First, the increased revenues will benefit NFL players by helping to fund the NFLPA's settlement administration and collective bargaining operations, with the remainder of the funds to be distributed directly to NFL players for their individual benefit. Allen Supp. Decl. P 12. Second, while NFL players get the full benefit of the $5 million in increased licensing revenues that the NFLPA will receive each year for the next seven years, the Salary Cap (which is based on Defined Gross Revenues) will not be imposed either this year or in 1999, and may not be in effect for some or all of the five years in between. As a result, players will receive a guaranteed benefit of $35 million over the next seven years under Proposed Amendment No. 6, but at most, only $14,500,000 (58% of $25 million, assuming that the Salary Cap is in effect for all five years) will be deducted as an offset from the league-wide salary guarantees. Thus, this amendment produces a net benefit to players of more than $20 million dollars. Kessler Decl. P 23.

6.5 The court finds that the requested findings concerning the scope and applicability of the nonstatutory

labor exemption also benefit the class by providing labor and litigation peace during the term of the Settlement Agreement. See infra Section X (detailing requested findings).

B. Class Counsel and Class Members Believe that the Amended Stipulation and Settlement Agreement is Fair, Reasonable and Adequate

6.6 When seeking approval of the original Stipulation and Settlement Agreement, class counsel submitted declarations stating their belief that the settlement, as originally proposed, was in the best interests of the class. White, 822 F.Supp. P 6.9, at 1420-21 (citing declarations of James W. Quinn and Edward M. Glennon). In its order of April 30, 1993, the court found that class counsel are experienced and competent, and that class counsel and the named plaintiffs adequately represent the White class. White, 822 F.Supp. PP 2.12-2.21, at 1404-07. The court further noted that: As representatives of the plaintiffs in the Powell and McNeil cases, class counsel have been intimately involved in the entire five-year history of related lawsuits which culminated in the present settlement. The court therefore affords considerable weight to the opinion of experienced and competent counsel that is based on their informed understanding of the legal and factual issues involved. White, 822 F.Supp. P 6.9, at 1420-21; see Armstrong, 616 F.2d at 325 ("[w]hile the court ... should not abdicate its responsibility to review a class action settlement merely because counsel support it, the court is

entitled to rely heavily on the opinion of competent counsel"); Welsch, 667 F.Supp. at 1295 (the court is to give "great weight to ... the judgment of experienced counsel"). Accordingly, the court gives great weight to class counsel's opinion, as set forth in the declaration of Jeffrey L. Kessler, that the amended Settlement Agreement and the requested findings are reasonable, fair, provide substantial additional benefits to the class and are in the best interests of the class. Kessler Decl. P 4.

6.7 The overall favorable response of the named plaintiffs and other class members to both the original settlement, and the pending motions, strongly supports the settlement of this action. After extensive notice by mail and publication, out of a class of more than 5,000 members, only eighty-nine college and professional players objected to the terms of the original Settlement Agreement; [FN50] only twenty-eight of the original objectors, and no new objectors, filed objections to the proposed amendments and requested findings. See supra note 20 (listing objectors to the pending motions).

FN50. See White, 822 F.Supp. at 1397-98 & nn. 11-12.

Moreover, ninety-six percent of the players who voted supported the ratification of the new Collective Bargaining Agreement, which virtually mirrors the terms of the player movement rules set forth in the amended version

of the Settlement Agreement. [FN51] That ratification eliminates any doubt regarding the players' position, and demonstrates that the amended Settlement Agreement is overwhelmingly supported by NFL players.

FN51. As previously noted, players ratified the new Collective Bargaining Agreement by a vote of 788 to 34. Allen Supp.Decl. P 2.

C. Complexity, Expense and Likely Duration of Further Litigation

6.8 As the court found in its order of April 30, 1993, "[c]ontinued litigation of the present action would be complex, expensive and protracted" because: (a) an appeal in McNeil, which would likely be lengthy and present complex and novel legal issues, may affect or even preclude a finding of liability; [FN52]

FN52. Those issues include: the applicability of the nonstatutory labor exemption, defendants' alleged incapacity as a "single entity" to enter into an antitrust conspiracy, the proper application of the rule of reason under Section 1 of the Sherman Act, and the "fact of injury" element of liability in a private antitrust action. White, 822 F.Supp. P 6.2(a), at 1418.

(b) additional liability issues ... would have to be tried, including the legality of the college draft and the issue

of preseason pay; (c) there exist complex issues concerning injunctive relief; and (d) players would be faced with the difficulty in proving damages arising from the imposition of various player rules. [FN53]

FN53. The courts that approved the settlements of the analogous Alexander and Robertson cases both noted that proof of damages in cases such as this can be extremely time-consuming and costly. Alexander, 1977-2 Trade Cas. (CCH) P 61,730, at 72,995, 1977 WL 1497, at *15 (trial of damages issues would be "lengthy, costly and almost overwhelming"); Robertson, 72 F.R.D. at 70. In addition, "[p]laintiffs' experience in McNeil underscores the problems in proving such damages." See White, 822 F.Supp. P 6.8, at 1420.

See White, 822 F.Supp. P 6.2, at 1417-18.

D. The Extent of Discovery Completed and the State of the Proceedings

6.9 The extent of discovery completed and the stage of the proceedings at which settlement is reached are important factors because they are indicative of the court and counsel's ability to evaluate the merits of plaintiffs' claims. Armstrong, 616 F.2d at 325; Welsch, 667 F.Supp. at 1297. Although White is technically in its early stages, the court and class counsel's evaluation of the merits of plaintiffs' claims is necessarily informed by the comprehensive records compiled in the prior player lawsuits

involving similar or identical issues. Just as the Alexander court was able to evaluate the propriety of the proposed class action in light of its experience in the Mackey case, here the McNeil case, which after years of discovery and a three-month trial has been litigated through verdict, provides a sound basis on which to evaluate the strengths and weaknesses of plaintiffs' claims and the merits of the settlement as amended. See White, P 6.12, at 1421.

E. The Original Settlement Agreement, the Proposed Changes and the Requested Factual Findings are the Product of Arm's Length Negotiations

6.10 This court previously found that: The proposed settlement is the culmination of over five years of hard fought litigation in which NFL players, represented by class counsel, challenged the legality of the NFL player reservation system. White, 822 F.Supp. P 6.13, at 1421 (citing Robertson v. National Basketball Ass'n, 389 F.Supp. 867, 899 (D.C.N.Y.1975) ("[t]he four-year history of this litigation is sufficient indication that the named plaintiffs and their counsel will fairly and adequately protect the interests of the class")). The court observed that: [D]uring the course of the litigation, the court presided over various related cases and participated in the final stages of the settlement negotiations. As a result of its involvement, the court is aware that the settlement was not reached easily, but represents the product of long and difficult negotiations, conducted in good faith and at arm's length by experienced and able attorneys. Id. (citations omitted). In making that

determination, the court relied on the following factors: the size and complexity of the [Settlement] Agreement and the compromises reflected therein; the context in which it was reached, that is, after five and one-half years of frequently acrimonious litigation; the court's personal knowledge of the negotiators and the tenacity with which they struggled to protect their principals' interests; and the need for the court's involvement in the final stages of the negotiations. Id. The court finally relied on its determination that the terms of the original Stipulation and Settlement Agreement are fair, reasonable and adequate to the class because in such circumstances, the court may presume that the negotiations were proper. Id. (citing Bowling v. Pfizer, Inc., 143 F.R.D. 141, 152 (S.D.Ohio 1992) (citation omitted)); see also White, Transcript of Preliminary Approval Hearing for the Original Settlement Agreement at 82-84 (Feb. 26, 1993) (finding no evidence of collusion and concluding settlement was product of arm's length negotiations).

After the parties reached agreement on the terms of the original Stipulation and Settlement Agreement, class counsel and the NFLPA, in the course of negotiating the terms of the new Collective Bargaining Agreement, were able to obtain further concessions from the NFL which afford substantial additional benefits to the class. See supra P 6.4 (setting forth those benefits). The court finds that the proposed amendments, which reflect those concessions, further demonstrate that the settlement is the product of

arm's length negotiations.

VII. THE CLAIMS OF THE OBJECTORS DO NOT WARRANT DISAPPROVAL OF THE AMENDED SETTLEMENT AGREEMENT

7.1 Objections to the pending motions were filed on behalf of twenty-eight players who had previously objected to the original Stipulation and Settlement Agreement. [FN54] In addition, one NFL member club, the Philadelphia Eagles, has objected to the motions. Section VII of this opinion will address the substantive objections to the motions to amend the Settlement Agreement, and to approve the amended Settlement Agreement. [FN55] Objections to the motion for further factual findings will be discussed in Section X of the opinion.

FN54. See supra note 20 (listing those objectors, and also the twenty- seven players who objected at the preliminary hearing, but failed to subsequently object or appear at the final settlement hearing on July 7, 1993).

FN55. Objections to the adequacy of notice and the certification of a mandatory class are discussed supra. See ss I-III. Objections to the court's jurisdiction are discussed infra. See ss XI-XII.

A. Player Objections to the Motions to Amend and Approve the Settlement Agreement

7.2 When evaluating the objections to the original

Settlement Agreement in the order of April 30, 1993, the court first observed that claims of inadequacy by some class members are entitled to little weight in situations where the "vast preponderance of the class members" do not oppose the terms of a settlement. White, 822 F.Supp. P 7.2, at 1425 (quoting City of Detroit v. Grinnell Corp., 495 F.2d 448, 462 (2d Cir.1974)); cf. Van Horn, 840 F.2d at 606 ("class settlement may be approved over significant percentage of objections from class members"). In any given year, the NFL employs approximately 1,500 players during the course of the regular season, and employs hundreds of additional players during the preseason. Class counsel estimates that the White class consists of more than 5,000 active and former NFL players, as well as numerous players who are likely to be drafted. Less than two percent of the total class objected to the terms of the original settlement. White, 822 F.Supp. P 7.2, at 1425. Less than one percent of the total class object to the amended version of the Settlement Agreement. See supra note 20. In addition, the new Collective Bargaining Agreement was ratified by over ninety- six percent of the players who voted. Based on the foregoing, the court concludes that the vast preponderance of the class supports the proposed settlement.

7.3 As a preliminary matter, the court notes that most of the objections to the amended Stipulation and Settlement Agreement and the requested findings of fact simply renew objections that have already been considered

and rejected by the court. Other than the Philadelphia Eagles, the overwhelming majority of class members who oppose the original or the amended version of the Settlement Agreement on the merits do so because: (i) one or more elements of the proposed player reservation system allegedly violate the antitrust laws, or (ii) one or more provisions of the settlement are allegedly unfair as applied to that player or group of players. The court incorporates the findings set forth in its order of April 30, 1993, concerning players' objections to the original Settlement Agreement, and makes the following additional findings. [FN56]

FN56. The court did not address most of the objections individually because many of the player-objectors have moved to join with others' objections, either in their briefs or at one or more of the hearings.

7.4 A number of objectors contend that the court must withhold its approval because various provisions of either the original Settlement Agreement, or the amended version of the Agreement, violate the antitrust laws.

7.5 The order of April 30, 1993, set forth the standard by which the court is to review the amended Settlement Agreement: In reviewing a proposed class action settlement, the Eighth Circuit has determined that the trial court does not have the privilege or duty of independently resolving the issues of fact and law 'which underlie the merits of the dispute.' White, 822 F.Supp. P 7.5, at 1425

(quoting Grunin, 513 F.2d at 123 (quotation omitted)). " 'The very purpose of compromise is to avoid the delay and expense of such a trial.' " Id. (quoting Grunin, 513 F.2d at 124 (quotation omitted)).

7.6 When evaluating the propriety of an antitrust class action settlement, the Grunin court further held that: unless the terms of the agreement are per se violations of antitrust law, we must apply a 'reasonableness under the totality of the circumstances' standard to the court's approval. Grunin, 513 F.2d at 124.

7.7 The Second Circuit applied the Grunin standard when affirming the district court's approval of the Robertson class action settlement, which involved the antitrust claims of professional basketball players. The Second Circuit held that such a settlement agreement should be approved unless the terms of the agreement are per se illegal, are illegal to a "legal certainty" or authorize future conduct that is clearly illegal. Robertson, 556 F.2d at 686 (quoting Grunin, 513 F.2d at 124).

7.8 In McNeil, this court determined that right of first refusal/compensation rules of Plan B should be evaluated under the rule of reason, rather than the per se rule. McNeil v. National Football League, 790 F.Supp. 871, 896-97 (D.Minn.1992). [FN57] In making that determination, the court observed that all of the cases to date had "applied the rule of reason rather than the per se analysis" to evaluate whether various NFL player restrictions violated the antitrust laws. Id. [FN58]

Therefore, in the absence of a full trial on the merits, it is unlikely that the proposed settlement, taken as a whole, would be deemed a per se violation of the antitrust laws because the amended Settlement Agreement would likely be subject to analysis under the rule of reason. See Robertson, 556 F.2d at 686 (court should not disapprove of settlement if "challenged practices have not been held to be per se illegal in any previously decided case"); Grunin, 513 F.2d at 124. Moreover, the Alexander court expressly approved, and the Eighth Circuit upheld, a player reservation system that was more restrictive than that set forth in the present settlement. [FN59]

FN57. The McNeil plaintiffs argued that there was "sufficient judicial experience" concerning the illegality of various player restraints "to warrant the application of the per se rule" to the challenged Plan B rules. 790 F.Supp. at 896. The court rejected that contention, concluding that it was "bound by the Mackey decision, in which the Eighth Circuit determined that the Rozelle Rule should be judged under the rule of reason", rather than the per se rule. Id. at 897. The order of April 30, 1993 noted that: if there is future litigation concerning the legality of any NFL player rules, plaintiffs' argument may be adopted by some court. This court, however, makes no ruling on the issue. White, 822 F.Supp. at 1426 n. 55.

FN58. See, e.g., Mackey v. National Football

League, 543 F.2d 606, 619 (8th Cir.1976) ("the unique nature of the business of professional football renders it inappropriate to mechanically apply per se illegality rules"); Smith v. Pro Football, Inc., 593 F.2d 1173, 1182 (D.C.Cir.1978) ("the legality of player restrictions in professional sports should be governed by the rule of reason"); Kapp v. National Football League, 390 F.Supp. 73, 82 (N.D.Cal.1974) ("in this particular field of sports league activities the purposes of the antitrust laws can be just as well served (if not better served) by the basic antitrust reasonableness test as by the absolute per se test sometimes applied by the courts in other fields"), aff'd in part and dismissed in part on other grounds, 586 F.2d 644 (9th Cir.1978), cert. denied, 441 U.S. 907, 99 S.Ct. 1996, 60 L.Ed.2d 375 (1979).

FN59. Some objectors argue that the Franchise Player provisions violate the antitrust laws based on their contention that the Franchise Player rules are as restrictive as the right of first refusal/compensation rules of Plan B. The McNeil jury found that the Plan B rules, which permitted the restriction of thirty-seven players per team, were more restrictive than reasonably necessary. McNeil, 1992 WL 315292, at *1 (special verdict form). The Franchise Player provisions, however, are narrower in scope because they permit restriction of, at most, only one player per team per year. White, 822 F.Supp. P 7.13, at 1426-27 & n. 59. Moreover, only ten teams actually

designated Franchise Players for the 1993 season, likely as a result of the substantial tenders that were required for such designation under the terms of the original Settlement Agreement. Id. at 1427 n. 57. The court therefore rejects the contention that the Franchise Player rules must be altered because they are as restrictive as the Plan B rules. The court further concludes that the objectors' reliance on the McNeil verdict may be misplaced. As previously discussed, the McNeil verdict has never been appealed, and the case raises numerous novel and difficult legal issues that, if resolved in defendants' favor, could preclude players' ability to establish liability and damages. See supra P 6.2(a) (setting forth those issues).

The order of April 30, 1993, noted that: It is also significant that all aspects of the new free agency system contained in the Settlement Agreement ... will likely be included in a new collective bargaining agreement, under which such provisions would be exempt from antitrust law as a result of the nonstatutory labor exemption. White, 822 F.Supp. P 7.16, at 1428. As previously discussed, the free agency system set forth in the amended Settlement Agreement has been incorporated almost verbatim in the new Collective Bargaining Agreement, and any such rules would therefore be exempt from antitrust challenge during the express term of the new Collective Bargaining Agreement. See infra s X (reaffirming that conclusion). Accordingly, the court overrules any objections concerning

the legality of the amended Settlement Agreement under the antitrust laws, and concludes that the amended Settlement Agreement, as a whole, is not per se illegal. Cf. White, 822 F.Supp. P 7.29(d), at 1432 (original Settlement Agreement is not per se illegal). [FN60]

FN60. The court noted in its order of April 30, 1993, that: the revised player employment rules set forth in the Settlement Agreement constitute a new and unique approach to player employment in the NFL. Class counsel and the NFLPA believe that the entire Agreement will benefit the overwhelming majority of the players in the NFL, and raise salaries throughout the league. Defendants believe that the provisions challenged by various objectors, including the college draft, the rules concerning modified free agency, the Franchise and Transition Player provisions, the Final Eight Plan and the salary cap, are essential for the maintenance of competitive balance, quality of play and franchise stability. White, 822 F.Supp. P 7.12, at 1426 (footnote omitted). Class counsel and the named plaintiffs believe that none of the player movement or employment rules set forth in the amended Settlement Agreement bear any relation to competitive balance, the quality of play or franchise stability. The court, however, need not resolve this dispute, but rather notes that the existence of the dispute, as well as the parties' agreement to various settlement provisions, such as the Franchise and Transition Player rules, the College Draft, the Entering Player Pool,

the veteran free agency rules, the Final Eight Plan, and the Guaranteed League-Wide Salary, Salary Cap, and Minimum Team Salary rules, merely demonstrate that the settlement was negotiated at arm's length and in good faith. The court will therefore not second-guess the parties' hard-bargained agreement where the amended Settlement Agreement itself is not, as a whole, illegal per se.

7.9 As with the original Settlement Agreement, various objectors ask the court to disapprove of the entire amended Settlement Agreement because of one or two provisions. Alternatively, they ask the court to strike or revise those provisions before approving the terms of the amended settlement.

7.10 In Evans v. Jeff D., the Supreme Court determined that when a district court evaluates the settlement of a class action: Rule 23(e) does not give the court the power, in advance of trial, to modify a proposed consent decree.... The options available to the District Court [a]re essentially the same as those available to respondents: it could have accepted the proposed settlement; it could have rejected the proposal and postponed the trial to see if a different settlement could be achieved; or it could have decided to try the case. Evans v. Jeff D., 475 U.S. 717, 726-27, 106 S.Ct. 1531, 1537, 89 L.Ed.2d 747 (1986).

This court has held that: in acting to protect the interests of the class when reviewing a settlement, the court

cannot rewrite or modify the terms of the agreement.... The settlement must be approved or disapproved as a whole. Welsch, 667 F.Supp. at 1289-90 (citations omitted). Another judge in this district has similarly ruled that: [a]lthough the court must act to protect the interests of the class when reviewing the proposed settlement, the court also recognizes that it is limited in its ability to change that agreement. The proposed settlement must stand or fall as a whole.... The court is not to dictate or rewrite the terms of the proposed agreement. Holden, 665 F.Supp. at 1406 (citations omitted).

Applying that standard, this court previously determined that: even if it were sympathetic to objections directed at one or more provisions of the Settlement Agreement, the court may not pick and choose which provisions to approve and which to disapprove. White, 822 F.Supp. P 7.10, at 1426.

7.11 At least one objector, Paul Gruber, contends that by seeking approval of the proposed amendments to the original version of the Stipulation and Settlement Agreement, the parties are improperly asking the court to pick and choose which provisions to approve or disapprove. He argues that if the parties have the right to make such a request, the objectors must also have that right.

The parties, however, do not ask the court to pick and choose among various provisions, but instead seek court approval of the entire amended Stipulation and Settlement Agreement. The parties are thus asking the court to

approve their own agreement to amend the original Settlement Agreement, a situation which is distinguishable from that presented when an objector asks the court, on its own initiative, to modify or rewrite the terms of the parties' agreement. It is entirely appropriate that the parties seek court approval of an amendment to their own settlement agreement. See, e.g., Liddell v. Board of Educ., 867 F.2d 1153, 1155 (8th Cir.1989) (district court had authority to approve proposed amendment to settlement agreement that modified the terms of the original settlement to provide the parties with additional time to meet certain obligations); Harris v. Reeves, 761 F.Supp. 382, 394-402 (E.D.Pa.1991) (approving stipulation and agreement that revised and superseded an earlier settlement agreement which had been entered as a consent order); cf. Bridgeman v. National Basketball Ass'n, Civ. No. 87-4001, Transcript at 13 (D.N.J. Sept. 24, 1990) (analyzing whether proposed amendment to the Bridgeman NBA settlement agreement "should be approved as fair, reasonable and adequate"). As previously discussed, however, it is improper for the court, on its own initiative or at the request of an objector, to rewrite or modify the parties' agreement before approving it. See Evans v. Jeff D., 475 U.S. at 726-27, 106 S.Ct. at 1537; Welsch, 667 F.Supp. at 1289-90) ("the court cannot rewrite or modify the terms of the agreement"); Holden, 665 F.Supp. at 1406 ("[t]he court is not to dictate or rewrite the terms of the proposed settlement"); supra P 7.10. The court therefore rejects Mr. Gruber's contention.

7.12 If the court concludes that the amended Settlement Agreement, as a whole, is fair, reasonable and adequate to the class, its inquiry is ended and it should approve the entire settlement.

7.13 When evaluating the original Settlement Agreement, the court determined that: after carefully considering all of the objections that call into question a specific provision or provisions of the Settlement Agreement, the court nonetheless concludes that the Agreement, as a whole, is fair, reasonable and adequate to the class. Accordingly, the court will not deny final approval on the basis of those objections. White, 822 F.Supp. P 7.11, at 1426.

7.14 After analyzing the objections to various provisions of the amended Settlement Agreement, the court finds that the amended Agreement, taken as a whole, is also fair, reasonable and adequate to the class. Therefore, the court will not withhold final approval of the amended Settlement Agreement on the basis of the objections to various individual provisions.

7.15 Although the court must analyze the amended Settlement Agreement as a whole, the following specific objections to the amended Settlement Agreement have been made.

7.16 Various players continue to object to the Franchise Player provisions, arguing that the amended rules are no more reasonable than those set forth in the original Settlement Agreement. In approving the original Settlement

Agreement, the court made the following findings concerning the Franchise Player provisions contained therein: (i) a club invoking the Franchise Player provisions must make an extraordinarily high salary tender to any player so designated; (ii) such required tenders act merely as a floor and not a ceiling on the designated player's salary; and (iii) the Franchise Player provisions are extremely limited in scope. Id. P 7.13, at 1426-27 (footnotes omitted). The court further found that the minimum tender for Franchise Players "protects class members to the extent that it deters teams from making such designations." Id. at 1427 n. 57. The court concluded that "objections to the Franchise Player provisions provide no basis on which to reject the proposed settlement." Id. P 7.13, at 1427.

The court also concludes that the objections to the amended Franchise Player rules provide no basis for disapproving the entire amended Settlement Agreement. As previously discussed, the amended rules provide 1993 Franchise Players with additional benefits, either by increasing the minimum tenders required for such designations [FN61] or by affording players greater freedom to negotiate with other clubs. [FN62] See supra P 6.4(a) (detailing additional benefits).

FN61. Under the amended rules, the minimum tender is based on the average of the top five salaries at that player's position for this year, rather than 1992, thereby

permitting 1993 Franchise Players to participate in the increased salaries that other players have obtained as a result of the introduction of free agency into the marketplace. Moreover, as previously noted, that change renders moot any objection that the 1993 Franchise Players will be deprived of any increase in the marketplace for the current year, and will always be one year behind other players for purposes of participating in market-wide salary increases. See White, 822 F.Supp. P 7.13, at 1426-27 & n. 60.

FN62. If a Franchise Player receives a tender for the average of the five highest salaries for players at his position as of the prior year, that player is free to negotiate a player contract with any club, subject to a right of first refusal and draft choice compensation of two first round draft picks. This amendment eliminates the blanket prohibition against movement set forth in the prior version of the Franchise Player provisions.

Players who are designated as Franchise Players in future years will similarly benefit under the amended rules, either by receiving upgraded tenders or new opportunities to market their services to other teams subject to a right of first refusal and draft choice compensation. See supra P 4.1(a) (detailing provision as it applies to future years). [FN63]

FN63. As previously discussed, recent marketplace

evidence also confirms that Franchise Players will likely benefit by receiving significant salary increases. See supra P 6.4(a).

Based on the foregoing, the court concludes that the amendment to the Franchise Player rules serves only to provide additional benefits to the players so designated, and thus provides no basis for disapproving the entire amended Settlement Agreement.

7.17 Other class members object to the expansion related amendments to the college draft and entering player pool provisions, arguing that the change will result in the restriction of a greater number of college, and possibly veteran, players. [FN64] Those amendments, however, will facilitate expansion in the NFL, thereby providing a substantial number of additional jobs for both college and other players. [FN65] The amendments afford further benefit to players by creating an exception to the Salary Cap for bonuses that the NFL has agreed to provide for veteran players under contract who are drafted by expansion clubs. The court further notes that none of the objections to the expansion related amendments have been asserted by, or on behalf of, college or other future NFL players, the group most likely to be affected by the changes. [FN66] Based on the foregoing, the court overrules any objections to the expansion related amendments based on the contention that those amendments impermissibly restrict a greater number of players.

FN64. The court previously overruled all objections to the entering player pool and college draft provisions as set forth in the original Stipulation and Settlement Agreement. See White, 822 F.Supp. P 7.17, at 1428.

FN65. Defendants also contend that the amendments will afford new teams greater access to the available talent, thereby increasing the likelihood that such teams will become more competitive in their early years of play. Plaintiffs dispute that contention, and the court makes no finding concerning defendants' assertion.

FN66. Although sixteen college players objected to the original Stipulation and Settlement Agreement, see White, 822 F.Supp. at 1398 & n. 12, none of those players, or any other college players, filed objections to the pending motions to amend the Settlement Agreement and for further factual findings.

7.18 Other objectors contend that Proposed Amendment No. 3, which clarifies the rules regarding what type of conditional salary must be matched in order to retain a player subject to a right of first refusal, will reduce player movement, thereby harming the class and violating the antitrust laws. There is no evidence to support the contention that the clarifications will impede player movement, and the court finds that it is unclear what effect, if any, the proposed amendment will have on any such

movement. Moreover, as previously discussed, it is not for the court to determine, in the absence of a per se violation of the antitrust laws, the antitrust reasonableness of a specific provision of the Settlement Agreement. See supra PP 7.6-7.8. Finally, the court concludes that the amendment will benefit class members to the extent that such clarifications may increase the efficiency of the offer sheet process and eliminate the need for numerous future arbitrations, as well as additional uncertainty and delay. Accordingly, the court overrules the objections to the offer sheet clarifications set forth in Proposed Amendment No. 3.

7.19 The court stated in the order of April 30, 1993, that it had: considered objections to the salary cap provisions, and concludes that such objections do not warrant disapproval of the settlement. [T]he salary cap must not be viewed in isolation, but rather, in connection with the entire agreement accepted by class counsel, including the liberalized free agency provisions and the minimum revenue guarantees that would accompany the "triggering" of the salary cap provisions. White, 822 F.Supp. P 7.16, at 1428; see id. PP 4.3-4.5, at 1413-14 (summarizing Salary Cap provisions). Various objectors contend that Proposed Amendment No. 4, which provides a mechanism for Salary Cap adjustments in the event that player benefit costs increase, affords improper payments or other consideration to the NFLPA.

The new Collective Bargaining Agreement provides the NFLPA with greater discretion in regulating the

allocation of total revenues going to players in the form of benefits and salaries. [FN67] Proposed Amendment No. 4 provides that the "Projected Benefits" figure under the Settlement Agreement, on which the Salary Cap and Minimum Team Salary are based, may be immediately recalculated to reflect any change in Projected Benefits, thereby increasing the money available under the Salary Cap for players' salaries. The court finds that the proposed amendment will protect players in the event that projected player benefit costs, which are substantially increased as a result of the much larger benefits provided under the Collective Bargaining Agreement, unexpectedly increase as a percentage of Defined Gross Revenues at a time when the Salary Cap is in effect. Without such a mechanism, unexpected future increases in benefit costs (as a percentage of Defined Gross Revenues) could hold down the Salary Cap to levels that are detrimental to class members. The amendment does not provide the NFLPA with any payments or other consideration, but merely affords a necessary and appropriate mechanism to effectuate the NFLPA's increased discretion under the new Collective Bargaining Agreement. The court therefore finds that the change clearly benefits all class members, and overrules the objections to Proposed Amendment No. 4.

FN67. Under the new Collective Bargaining Agreement, the NFLPA has the right to: (1) contest the NFL's Projected Benefits Costs, see Collective Bargaining

Agreement, art. XLVI, s 4; and (2) reduce player benefit payments to a level not less than seven percent of Projected Defined Gross Revenues. Id. s 1.

7.20 Various players object to Proposed Amendment No. 5, which allows the NFL to terminate the Stipulation and Settlement Agreement in the event that the players fail to ratify a new collective bargaining agreement. As previously set forth, on June 18, 1993, the NFLPA announced the ratification of the new Collective Bargaining Agreement. The amendment will have no impact on class members, therefore the court overrules as moot all objections to Proposed Amendment No. 5.

7.21 The court has also considered the objections to Proposed Amendment No. 6, which provides a partial credit to defendants in the calculation of Defined Gross Revenues to prevent double counting of certain additional revenues that may be provided to the NFLPA under the terms of the licensing litigation settlement. [FN68] As discussed more fully infra, the court rejects any claim that the settlement of the licensing litigation, in combination with Proposed Amendment No. 6, violates federal labor law. See PP 7.27-7.31. The court further concludes that the benefits to NFL players as a result of the licensing litigation settlement outweigh any potential reduction in the Salary Cap, and provide class members with a net benefit of more than $20 million dollars. See supra P 6.4(f) (setting forth basis of this conclusion); Allen Supp.Decl. PP 11-15; Kessler

Decl. PP 22-23. The court therefore overrules any player objection to Proposed Amendment No. 6.

FN68. This section will focus on players' objections to Proposed Amendment No. 6. Objections asserted by the Philadelphia Eagles will be discussed below. See infra PP 7.22-7.33.

B. The Philadelphia Eagles' Objections to the Motions to Amend and Approve the Settlement Agreement and to the Wording of the Proposed Consent Judgment

7.22 One of the defendants, the Philadelphia Eagles, opposes final approval of the amended Settlement Agreement and the motion for further factual findings, renewing its objections to the original Stipulation and Settlement Agreement. [FN69] The Eagles also object to the wording of the proposed Final Consent Judgement. (See Letter from Peter S. Hendrixson to court dated July 19, 1993). The court incorporates the findings set forth in its order of April 30, 1993, concerning the Eagles' objections, and makes the following additional findings. See White, 822 F.Supp. PP 7.19-7.27, at 1429-31.

FN69. The Eagles argued that the court should deny approval of the original Settlement Agreement because: (i) the proposed settlement of related litigation concerning players' licensing rights is unlawful; (ii) the NFLPA's role in settlement negotiations was in violation of the National Labor Relations Act; and (iii) the Settlement Agreement

improperly requires the court to issue an advisory opinion concerning the scope of the nonstatutory labor exemption. White, 822 F.Supp. P 7.19, at 1429.

7.23 In its order of April 30, 1993, the court found that the Eagles lacked standing to assert such objections for the following reasons: (1) the Settlement Agreement is not per se illegal, and thus the Eagles are unable to demonstrate any legal prejudice [FN70]; (2) the Eagles delegated complete authority to the NFL Management Council to settle the case and, pursuant to the Articles of Association and Bylaws of the Council, are bound by the Council's actions, including its unanimous approval of the present settlement; (3) the Eagles have breached their obligation under the Settlement Agreement "not [to] take any action to delay or hinder" court approval of the Settlement Agreement; and (4) the Eagles have violated the court's order of February 26, 1993, which required all defendants to abide by the terms of the Settlement Agreement (including the provisions discussed immediately above) pending the court's final ruling on the Settlement Agreement. [FN71] White, 822 F.Supp. P 7.20, at 1429-30.

FN70. See, e.g., Alumax Mill Prods., Inc. v. Congress Fin. Corp., 912 F.2d 996, 1001-02 (8th Cir.1990) (a nonsettling defendant has standing to object to a settlement only if it can demonstrate some form of legal

prejudice).

FN71. White, No. 4-92-906, slip op. at 5 (D.Minn. Feb. 26, 1993) (ordering defendants to abide by terms of Settlement Agreement).

At the final fairness hearing on July 7, 1993, counsel for the Eagles was afforded an opportunity to reargue the issue of standing, but failed to do so. White v. National Football League, Transcript of Final Fairness Hearing on the Pending Motions, at 71-84, 105 & 124-25 (July 7, 1993). The court therefore affirms, for the reasons previously set forth, that the Eagles lack standing to object to the amended Settlement Agreement, the requested findings of fact and the proposed Final Consent Judgment.

7.24 Despite that conclusion, the court will address the merits of Eagles' objections concerning the pending motions to ensure a complete record. [FN72] The principal thrust of the Eagles' renewed objections involves a challenge to the legality, under the federal antitrust and labor laws, of the related settlement between the NFL and the NFLPA of various lawsuits, and other disputes and claims, arising out of their respective licensing activities. The licensing settlement had not been consummated as of April 16, 1993, the date of the final fairness hearing on the original Settlement Agreement. In the order of April 30, 1993, the court found that it was under no obligation, pursuant to Federal Rule of Civil Procedure 23, to evaluate the terms of

the proposed licensing settlement, to which the original Stipulation and Settlement Agreement merely referred. The court reasoned that such an evaluation was irrelevant to the court's inquiry concerning whether the proposed Settlement Agreement was fair, reasonable and adequate to the class, and declined to address the merits of the Eagles' objections concerning the legality of the proposed licensing settlement. White, 822 F.Supp. P 7.22, at 1430.

FN72. The court similarly reached the merits of the Eagles' objections to the original Stipulation and Settlement Agreement. See White, 822 F.Supp. at 1429 n. 67, PP 7.21-7.27, at 1430-31.

The Eagles contend that the court must now address the arguments concerning the legality of the licensing settlement as a result of Proposed Amendment No. 6 to the White Settlement Agreement, which provides for an adjustment in Defined Gross Revenues to reflect any payments that the NFL may make to the NFLPA pursuant to the terms of the licensing settlement.

The parties agreed to the changes set forth in Proposed Amendment No. 6 in order to fully and fairly implement the settlement of the related licensing litigation, thereby effectuating a primary goal of the present Settlement Agreement, labor and litigation peace. Unlike the situation that existed when the parties sought approval of the original Stipulation and Settlement Agreement, which merely

referred to a possible settlement of the licensing litigation, the contemplated changes to the Settlement Agreement set forth in Proposed Amendment No. 6 have created a direct relationship between the settlement of the present action and the fully executed settlement of the licensing cases. Accordingly, the court now deems it necessary and appropriate to review various terms of the licensing settlement, at least to the extent that those terms bear a relationship to the motions pending before the court. [FN73]

FN73. The court thus alters its prior determination that all matters related to the settlement of the licensing litigation are "outside of the purview of this court". See Transcript of Hearing for Final Approval of the Original Settlement Agreement at 143 (D.Minn. Apr. 16, 1993). The court notes, however, that in addressing various matters concerning the licensing settlement, the court is not thereby "deciding whether [those cases] should be settled or not, or the terms of how that should be." Id.

7.25 The Eagles first object to the terms of the licensing litigation settlement and the corresponding amendment to the White Settlement Agreement, Proposed Amendment No. 6, because they allegedly harm NFL players. As a preliminary matter, the court notes the incongruity of the Eagles' contention that the changes to the calculation of Defined Gross Revenues are detrimental to players' interests. [FN74] The terms of the amended

Settlement Agreement, including that amendment, have been incorporated into a new Collective Bargaining Agreement that has been overwhelmingly ratified by NFL players, providing strong evidence of the fairness and adequacy of the White settlement. Proposed Amendment No. 6 must also be evaluated in light of the licensing settlement, the net effect of which is to provide more than $20 million dollars in additional benefits to NFL players. See supra PP 6.4(f), 7.21.

FN74. It seems highly unlikely that the Eagles' motivation stems from any genuine concern for players' interests. See White, 822 F.Supp. P 7.21, at 1430 (questioning the plausibility of the Eagles' objections in light of the evidence that the team is merely seeking additional draft selections as compensation for the loss of various players' services).

7.26 The court also rejects the Eagles' contention that the licensing payments will impermissibly enrich the NFLPA at the players' expense. The court finds that the NFLPA's interest in settling the licensing litigation does not conflict with the players' interests. [FN75] The court further finds that the payments to the NFLPA pursuant to the licensing litigation settlement will benefit players, either by direct payment of such funds to the players, or by helping to fund the NFLPA's collective bargaining activities and its obligation to administer and ensure compliance with

the Settlement Agreement. See Allen Supp. Decl. P 12. The court therefore rejects the Eagles' claim that the payments to the NFLPA under the terms of the licensing litigation settlement are contrary to the players' interests.

FN75. The court previously concluded that class counsel had no conflict in the present case as a result of any role in the licensing litigation, and that any alleged conflict had been rectified by class counsel's withdrawal from the representation of the NFLPA in the licensing litigation. See White, 822 F.Supp. at 1405 n. 29, 1430 n. 68 (citing Quinn Supp.Aff. PP 38-39).

Based on the foregoing, the court overrules the Eagles' objections to the extent that they rest on any alleged harm to class members' interests.

7.27 The court also finds no merit to the Eagles' contention that any payments provided by the NFL to the NFLPA in the licensing litigation settlement, and the corresponding amendment to calculation of Defined Gross Revenues under the White Settlement Agreement, violate section 302 of the Labor Management Relations Act, 29 U.S.C. s 186. Section 302(a) and (b) of that Act generally prohibit the payment of money, or any "other thing of value" by an employer to an employee representative. 29 U.S.C. s 186(a)-(b).

The general prohibition of section 302 is: aimed at forestalling practices Congress considered injurious to the

collective bargaining process such as bribery of employee representatives by employers, extortion by employee representatives, and the potential abuse of power by union officials armed with sole control of welfare funds. N.L.R.B. v. United Bhd. of Carpenters & Joiners, 531 F.2d 424, 427 (9th Cir.1976) (citing Arroyo v. United States, 359 U.S. 419, 79 S.Ct. 864, 3 L.Ed.2d 915 (1959)); see also United Steelworkers v. United States Gypsum Co., 492 F.2d 713, 734 (5th Cir.) ("the purpose of [section] 302(a) is to protect employers from extortion and to insure honest uninfluenced representation of employees"), cert. denied, 419 U.S. 998, 95 S.Ct. 312, 42 L.Ed.2d 271 (1974).

7.28 The general prohibition is subject to express statutory exceptions set forth in section 302(c) of the Act, 29 U.S.C. s 186(c). Congress did not intend that the general prohibition prevent a union or employee representative from vindicating its legal rights as to an employer, and thus enacted the settlement exception, section 302(c)(2), which exempts adjudicated awards and judgments, and also payments arising out of the voluntary settlement of claims and disputes, from the general prohibitions of the Act. The settlement exception specifically excludes: the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress. 29 U.S.C. s 186(c)(2).

7.29 None of the parties or objectors, including the Eagles, dispute that the licensing litigation settlement resolves a wide range of genuine legal controversies between the NFL and the NFLPA, in which substantial economic interests were at stake. The licensing cases were filed several years before any global settlement appeared to be possible, and were strenuously litigated by the NFLPA long before it again became the players' union. [FN76] For example, in one case the parties conducted approximately fifty depositions and extensive pretrial preparations. See Allen Supp.Decl. PP 9-11. The suits involved antitrust, tort, contract and other claims in nearly a dozen lawsuits all over the country, and sought injunctive relief against the NFL defendants, millions of dollars in treble damages and punitive damages of at least $10 million.

FN76. See White, 822 F.Supp. P 4.13, at 1415-16 & n. 35 (detailing the licensing litigation).

It is also undisputed that there are legitimate claims between the NFLPA and the NFL concerning whether the NFLPA has a valid trademark for the "NFL Players" logo. Those claims put at issue the value of defendants' other intellectual property rights, which last year alone provided between $55-60 million in revenues. See Declaration of Neil Austrian PP 4-8 (July 2, 1993) ("Austrian Decl."). As part of the global settlement, the NFLPA has agreed to withdraw its pending application to register "NFL Players"

as a trademark, an application that NFL Properties has opposed in a proceeding before the United States Patent and Trademark Office. The NFLPA has also agreed to refrain from marketing athletic wear bearing NFL team colors and city designations, for which the NFL was prepared to seek injunctive relief. Id. P 9.

There is also no evidence of fraud or duress in the settlement process, and no reasonable view of the facts suggests any improper influence. Based on the foregoing, the court finds that the licensing litigation settlement resolves a wide range of legitimate disputes between the NFL and the NFLPA. The court further concludes that the settlement exception set forth in section 302(c)(2) clearly applies to any payments made to the NFLPA pursuant to the licensing litigation settlement because such consideration is to be paid "in compromise, adjustment, settlement, or release of" bona fide claims. 29 U.S.C. s 186(c)(2). Accordingly, the Eagles' contention that the payments constitute a violation of section 302 is without merit. See, e.g., Washington Post v. Washington-Baltimore Newspaper Guild, Local 35, 787 F.2d 604, 607 (D.C.Cir.1986). [FN77]

FN77. The court also concludes that the sole case cited by the Eagles in support of their contention that the section 302(c)(2) exception does not apply, International Longshoreman's Ass'n v. Seatrain Lines, Inc., 326 F.2d 916 (2d Cir.1964), is inapposite. That case held that the

section 302(c)(2) exception did not apply to a payment that was made in response to a union's collective bargaining demands, and thus did not arise out of the settlement of a genuine claim or dispute concerning the parties' legal rights. Id. at 919-20.

7.30 The Eagles' section 302 objection to the licensing settlement, and the corresponding amendment to the White Settlement Agreement, is premised on the contention that the value of the consideration flowing from the NFL defendants to the NFLPA is excessive; in essence, that the licensing settlement is a "bad deal" for the NFL. However, in the absence of fraud or duress, section 302(c)(2) does not require the court to examine the actual terms of a settlement of legitimate claims for purposes of determining whether such consideration is "fair." [FN78]

FN78. The existence of a separate statutory exemption, set forth in section 302(c)(3), 29 U.S.C. s 186(c)(3), for payments arising out of the "sale or purchase of an article or commodity at the prevailing price in the regular course of business," suggests that the court is to scrutinize only those payments made pursuant to section 302(c)(3), not to the settlement exception set forth in section 302(c)(2), for the fairness of the exchange.

Moreover, even if it were required to assess the fairness of the exchange, the court rejects the Eagles' claim

that the licensing settlement is excessive. In making this determination, the court relies on the declaration of Neil Austrian, President and Chief Operating Officer of the NFL, which describes the substantial benefits that the NFL believes that it has received in the licensing settlement, [FN79] and the declaration of Commissioner Paul Tagliabue, which states that Mr. Braman, the Eagles' owner, has made remarks indicating strong support of the terms of the proposed licensing settlement. See Austrian Decl. PP 8, 10-11; Declaration of Paul Tagliabue P 39 (April 12, 1993); see also Allen Supp.Decl. P 11 (setting forth benefits received by NFL in the settlement of the licensing litigation).

FN79. Thus, the payments to the NFLPA may also be exempt under the sale at fair market value exception set forth in section 302(c)(3), 29 U.S.C. s 186(c)(3).

7.31 Finally, the court rejects various factual assertions underlying the Eagles' challenge under the federal labor laws. For example, the Eagles claim that the value of the group player licensing rights transferred to the NFLPA "may exceed $200 million", a statement based on the Eagles' belief that "NFL player licensing is a ... $20 million per year business." The only evidence before the court indicates, however, that NFL Properties' group licensing business actually lost $5 million in the past fiscal year, 1992. Austrian Decl. P 11.

The Eagles further assert that the NFL has agreed to

make an outright payment of $35 million to the NFLPA over the seven-year term of the settlement. That assertion, however, mischaracterizes the terms of the parties' agreement, under which the NFL is to pay the NFLPA $10 million to settle the antitrust and business interference claims asserted in the New York licensing lawsuit. See Licensing Settlement Agreement P 4 (May 6, 1993). Over the remaining years of the settlement agreement, the NFL will pay the NFLPA an additional sum of approximately $14.7 million. Id. P 5. The NFL has also agreed to guarantee an additional amount, up to approximately $20.3 million over the course of the settlement agreement, in the event that the NFLPA does not earn that amount from the Pro-Line and Game Day licenses that have been assigned to it under the terms of the licensing settlement. Id. P 12. If, however, the NFLPA earns the minimum revenues from the two card licenses, the NFL is not required to make any further payments. Id.

Accordingly, the court rejects the foregoing assertions of fact underlying the Eagles' federal labor law challenge.

7.32 The Eagles also challenge the legality of the licensing settlement under the federal antitrust laws, contending that the NFL's agreement to limit its future role concerning player group licensing rights constitutes an illegal division of markets.

The court first rejects the Eagles' claim that the NFL has agreed to discontinue its player licensing business and

"to stop competing with the NFLPA." Under the terms of the licensing settlement agreement, and pursuant to the definition of group player licensing rights in the new Collective Bargaining Agreement, the NFL, through NFL Properties, remains free to license Quarterback Club members, individual players and groups of less than six players. Austrian Decl. P 10; Collective Bargaining Agreement, art. V, s 4. The court thus concludes that the Eagles' "division of markets" claim is without factual foundation.

Even if the Eagles' factual allegations were true, the court finds that its antitrust challenge to the licensing settlement is fatally flawed. The NFL defendants' agreement to limit their ability, as employers, to individually negotiate with players for purposes of securing group licensing rights is expressly incorporated in the new Collective Bargaining Agreement. See id. [FN80] Although the legality of the Collective Bargaining Agreement is not directly before the court (except to the extent that provisions of the Collective Bargaining Agreement may incorporate the terms of the amended Settlement Agreement), the court notes that the Eagles' antitrust challenge would fail as a result of the application of the nonstatutory labor exemption. In Mackey v. National Football League, the Eighth Circuit determined that the nonstatutory labor exemption applies in the context of professional football to collectiveiy bargained provisions that: (1) primarily affect the parties to the collective

bargaining agreement; (2) concern a mandatory subject of collective bargaining; and (3) are the product of bona fide arm's length bargaining. 543 F.2d at 614.

FN80. That limitation is also included in paragraph 4 of the collectively bargained NFL Player Contract.

Examining those factors, the court first finds that the provisions at issue primarily affect the parties to the Collective Bargaining Agreement. All NFL players may choose to opt out of the provisions that purport to assign their group licensing rights to the NFLPA by simply striking the applicable paragraph of their NFL player contracts. That opt-out right ensures that third parties remain entirely free to compete with the NFLPA for players' group licensing rights.

The court further concludes that the provisions concern a mandatory subject of collective bargaining because they "pertain" to "the terms or conditions of [players'] employment" by limiting defendants' ability, as employers, to negotiate individually with players for certain of their publicity rights. See id. at 615. [FN81] The court also finds that the undisputed evidence, including the affidavits and declarations of the principals involved in negotiating the new Collective Bargaining Agreement, make clear that the challenged provisions were the product of bona fide arm's length negotiations. The court therefore concludes that the Eagles' antitrust challenge fails because

the nonstatutory labor exemption protects defendants' agreement to limit their ability to individually negotiate with players for purposes of securing group licensing rights.

FN81. Defendants also request that the court find that the players' licensing rights "are an emolument of NFL employment". Plaintiffs oppose that request. (Letter from Jeffrey L. Kessler to the court dated July 20, 1993). The court concludes that such a finding is unnecessary for purposes of determining whether the nonstatutory labor exemption applies to the provisions in the Collective Bargaining Agreement concerning players' licensing rights, and thus declines to make any ruling on that issue.

7.33 Finally, the court rejects the Eagles' request that the court postpone final approval of the amended Settlement Agreement in order to permit discovery. The court previously determined that: class members have been provided with, or had available to them, more than adequate information with which to analyze the fairness and reasonableness of the [original] settlement. White, 822 F.Supp. P 7.18, at 1429. The court finds that class members have also been provided with, or had access to, adequate information with which to analyze the pending motions to approve the amended Settlement Agreement and for further factual findings. The court also concludes that the record reflects no evidence of collusion. See id. P 2.19, at 1407; White, Transcript of Preliminary Approval

Hearing for the Original Settlement Agreement at 82-84 (Feb. 26, 1993) (finding no evidence of collusion and concluding settlement was product of arm's length negotiations). Accordingly, the court denies any request to postpone final approval of the amended Settlement Agreement or the issuance of further findings to permit discovery. See, e.g., In re Domestic Air Transp. Antitrust Litig., 144 F.R.D. 421, 424 (N.D.Ga.1992) (absent evidence of collusion, objectors have no right to seek discovery concerning the negotiations of a class action settlement) (citing Mars Steel Corp. v. Continental Illinois Nat'l Bank & Trust Co., 834 F.2d 677, 684 (7th Cir.1987)).

7.34 After carefully considering all of the objections to the amended Settlement Agreement, the court finds that it provides even greater benefits to class members than the original Settlement Agreement. Accordingly, the court concludes that the amended Settlement Agreement is fair, reasonable and adequate to the class, and, for the reasons previously set forth, overrules all of the objections to the motions to amend the Settlement Agreement and to approve the amended Agreement.

7.35 Based on the foregoing, the court makes the following additional findings of fact and conclusions of law: (a) The terms of the amended Stipulation and Settlement Agreement fundamentally modify the NFL's rules, policies and practices regarding veteran player movement and employment. The settlement also fundamentally modifies by

agreement the college draft, the NFL Player Contract, and various other terms and conditions of NFL player employment. (b) The revised player mobility and employment rules represent a successful effort by NFL players to eliminate Plan B, and to bring about substantial modifications in the principles relating to veteran player transfers. (c) Under Eighth Circuit law, when evaluating the amended Settlement Agreement, it is unnecessary for the court to determine whether every provision of the settlement, if adopted outside a settlement context and made subject to a trial on the merits, would be deemed reasonable after a full rule of reason inquiry. In fact, the court should not make such inquiry. (d) The amended Settlement Agreement, as a whole, is not per se illegal. (e) The settlement of the licensing litigation does not constitute an agreement not to compete in violation of the antitrust laws. (f) The provisions of the new Collective Bargaining Agreement related to group player licensing are exempt from antitrust scrutiny during the express term of the Collective Bargaining Agreement pursuant to the nonstatutory labor exemption. (g) Transfers that are made to the NFLPA pursuant to the settlement of the licensing litigation do not violate section 302 of the Labor Management Relations Act, 29 U.S.C. s 186, because such transfers are made in "compromise, adjustment, settlement, or release of" bona fide claims, and thus are exempt from the application of that statute. See 29 U.S.C. s 186(c)(2).

VIII. MOTIONS TO INTERVENE

8.1 The court incorporates all of the findings set forth in its April 30, 1993, order concerning the various motions to intervene, and makes the following additional findings.

8.2 Various objectors contend that the court's partial grant of various motions to intervene in its order of April 30, 1993, constitutes an implicit finding that the named plaintiffs inadequately represent absent class members. (See Letter from Robert A. Brunig to the court dated April 30, 1993). Because its determination is not the final word on the propriety of the present settlement, the court partially granted various motions to intervene solely for the purpose of providing certain objectors with the right to appeal. [FN82] The Eighth Circuit has expressly adopted that approach to permit all actions to be consolidated in one case. See Croyden Assocs. v. Alleco, Inc., 969 F.2d 675, 678-80 (8th Cir.1992) (unnamed class member must move to intervene in order to preserve right to appeal), cert. denied, --- U.S. ----, 113 S.Ct. 1251, 122 L.Ed.2d 650 (1993). The court's decision to partially grant certain motions to intervene does not indicate any ruling concerning the adequacy of representation or the validity of any objections, but merely serves as a mechanism to promote judicial economy by channeling all objections to one appellate court. See id.

FN82. The order of April 30, 1993 specifically provided that: the court denies all motions to intervene

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 9105 Sunset Boulevard, West Hollywood, California 90069; that on April 18, 1995, I served the within *Appendix For Petition For Writ of Certiorari (Volume II of IV)* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on April 18, 1995, Los Angeles, California.

Betty J. Malloy
(*Original Signed*)

Supreme Court, U.S.
FILED

94-749 APR 20 1995

OFFICE OF THE CLERK

No. _____

IN THE

Supreme Court of the United States

APRIL TERM, 1995

SEAN JONES, *et al.*,

Petitioners,

v.

REGGIE WHITE, *et al.*,

Respondents;

NATIONAL FOOTBALL LEAGUE, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

APPENDIX FOR PETITION FOR WRIT OF CERTIORARI
VOLUME III OF IV

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TABLE OF CONTENTS

Byron Evans, et al. v. National Football League, et al.
(Nos. 93-/3375/3381/3382/3403/3415MNMI)
United States Court of Appeals for the Eighth Circuit (January 20, 1995) Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc 1

Reggie White, et al. v. National Football League, et al.
(Nos. 93-3375, 93-3381, 93-3382, 93-3403, 93-3415)
United States Court of Appeals for the Eighth Circuit (December 6, 1994) Opinion of the Court 2

Reggie White, et al. v. National Football League, et al.
Civ. No. 4-92-906, United States District Court for the District of Minnesota (August 20, 1993) Order 18

Reggie White, et al. v. National Football League, et al.
Civ. No. 4-92-906, United States District Court for the District of Minnesota (August 20, 1993) Final Consent Judgment 26

Reggie White, et al. v. National Football League, et al.
Civ. No. 4-92-906, United States District Court for the District of Minnesota (August 19, 1993) Order 34

Reggie White, et al. v. National Football League, et al.
Civ. No. 4-92-906, United States District Court for the District of Minnesota (April 30, 1993) Order 170

except to the extent that the movants, other than Mr. Sheridan and the Tice plaintiffs, shall be permitted to intervene as "intervenor-objectors" solely for purposes of preserving their rights to appeal any judgment entered by the court in connection with the Stipulation and Settlement Agreement. However, none of the movants shall be considered named "plaintiffs" under the terms of the Stipulation and Settlement Agreement, none of the complaints in intervention shall be filed, and the named parties need not answer or otherwise respond to any of the complaints in intervention. White, 822 F.Supp. P 8.1, at 1432 (citations and footnotes omitted).

8.3 Accordingly, the court rejects those arguments concerning the motions to intervene, and reaffirms its determination that the named plaintiffs and class counsel adequately represent the entire class. See supra s II; White, 822 F.Supp. PP 2.12-2.21, at 1404-07.

IX. DEFENDANTS' MOTIONS TO ENJOIN OTHER ACTIONS

9.1 The court incorporates all of the findings set forth in its order of April 30, 1993, with respect to all matters involving defendants' motions to enjoin various other actions. Id. s IX, at 1433-35.

X. THE MOTION FOR FURTHER FACTUAL FINDINGS CONCERNING THE APPLICATION OF THE NONSTATUTORY LABOR EXEMPTION AND THE FORMATION OF THE NFLPA AS THE EXCLUSIVE

COLLECTIVE BARGAINING REPRESENTATIVE OF THE NFL PLAYERS

In its order of April 30, 1993, the court made the following findings concerning the NFLPA: [FN83]

FN83. See White, 822 F.Supp. PP 10.1-10.6, at 1435.

10.1 On January 6, 1993, the parties reached an agreement in principle to settle the present class action, as well as various other related litigation.

10.2 After an agreement in principle was reached on January 6, 1993, and after a vote of the Board of the NFLPA to seek to become the collective bargaining representative for the players, the NFLPA began to collect authorization cards from NFL players designating it as the exclusive collective bargaining representative of all present and future NFL players.

10.3 By letter dated March 23, 1993, Richard A. Berthelsen, General Counsel of the NFLPA, informed Commissioner Paul Tagliabue that "[a] majority of the players on 1992 season-ending rosters have now signed cards authorizing the NFLPA to represent them for the purposes of collective bargaining."

10.4 In accordance with an agreement between the NFLPA and the NFL, dated March 24, 1993, the American Arbitration Association conducted a check-off of signed cards of interest against the 1992 season-ending rosters. By

letter of March 26, 1993, the American Arbitration Association reported that 873 cards had been duly executed and returned by eligible voters, thus reestablishing the majority standing of the NFLPA.

10.5 Based upon the evidence verified by the American Arbitration Association that a majority of NFL players have recognized the NFLPA as their exclusive bargaining representative, the NFL voluntarily recognized the NFLPA as the sole and exclusive collective bargaining representative of present and future employee players in the NFL, as set forth in the previous NLRB Certification # 18-RC-8308, dated January 22, 1971. (See Letter from Harold Henderson, Executive Vice President for Labor Relations and Chairman of the NFL Management Council, to Eugene Upshaw, Executive Director of the NFLPA, dated March 29, 1993).

10.6 Based on the representations and sworn testimony of the parties, it appears that at all times during this process, the NFLPA maintained that it would not accept any assistance from either the NFL, or any of its member clubs. Nor did the NFL, or any of its member clubs, take any action which either hindered or supported the formation of the NFLPA as the exclusive collective bargaining representative of all present and future NFL players.

10.7 Relying on the foregoing, the court reached the following conclusions concerning the NFLPA in the April 30, 1993 order: [FN84]

FN84. See White, 822 F.Supp. P 10.7, 1435-36.

(a) The NFLPA has been lawfully formed and selected by the players to serve as the exclusive collective bargaining representative of all present and future NFL players. (b) Neither the NFL nor any of its members have taken any action which in any way hindered or supported the formation of the NFLPA as the exclusive collective bargaining representative of all present and future NFL players. (c) The NFL and its member clubs have lawfully recognized the NFLPA as the players' exclusive collective bargaining representative. (d) Accordingly, the NFLPA is fully authorized and empowered to enter into a new collective bargaining agreement with the NFL and its member clubs.

10.8 The court incorporates the foregoing findings concerning the NFLPA, and supplements them as follows.

10.9 On March 31, 1993, two days after the NFL officially recognized the NFLPA as the exclusive bargaining representative of all present and future NFL players, representatives of the NFL Management Council and the NFLPA began to meet in an effort to negotiate a new collective bargaining agreement between players and the NFL member clubs. Those meetings continued almost daily until May 6, 1993, at which time the parties reached agreement on the terms of a new collective bargaining agreement.

10.10 Relying on the representations and sworn

testimony of the parties, the court finds that the collective bargaining negotiations encompassed a wide range of matters relating to the terms and conditions of NFL player employment. The new Collective Bargaining Agreement incorporates, almost verbatim, all of the system-related provisions set forth in the Stipulation and Settlement Agreement. However, some of those provisions were modified during the negotiation process. The court concludes that those modifications are strong evidence that the systems-related provisions were the subject of hard bargaining, and are the product of the give-and-take inherent in such negotiations. [FN85]

FN85. As previously discussed, the Settlement Agreement had to be amended to reflect those changes.

The court has previously recognized that, given the long history of acrimony and disagreement between the NFL and its players concerning the player employment rules at issue here, any accord could only have resulted from long and difficult negotiations, conducted in good faith and at arm's length. White, 822 F.Supp. P 6.13, at 1421. The court finds that this determination is equally true in the collective bargaining context, where the representatives of the NFL and NFLPA have expressly agreed to incorporate those systems-related provisions in the new Collective Bargaining Agreement.

10.11 Certain objectors allege that the NFLPA

cannot be deemed the valid collective bargaining representative of the NFL players because it engaged in collective bargaining before it was reconstituted as a union and recognized by the NFL Management Council as the players' collective bargaining representative.

The court previously determined that the NFLPA's participation in the settlement negotiations as a consultant to class counsel was proper. [FN86] Based on the evidence in the record, the court further finds that the parties did not engage in any collective bargaining prior to the NFLPA's reformation as a union, and that the objectors present no credible arguments or evidence to the contrary. See Allen Supp.Decl. PP 4-8; Declaration of James W. Quinn P 9 & Exh. A (July 2, 1993) (hereinafter "Quinn Decl."); Declaration of Harold Henderson PP 3-4 (June 29, 1993). [FN87] The court therefore overrules all such objections.

FN86. This court, in McNeil, and the Associate General Counsel of the NLRB have both determined that by sponsoring various lawsuits, the NFLPA was not thereby acting as the players' collective bargaining representative. See Powell v. National Football League, 764 F.Supp. 1351 (D.Minn.1991) (in McNeil, rejecting without discussing defendants' claim that the NFLPA continued to function as a union because it was funding various lawsuits); see Defs.' Mem.Opp'n Pls.' Mot.Partial Summ.J. at 10 (Oct. 26, 1990) (raising that contention); Pittsburgh Steelers, Inc., No. 6-CA-23143, 1991 WL 144468 (June 26, 1991).

Accordingly, the court previously concluded that: Where it was appropriate for the NFLPA to finance the prosecution of antitrust litigation challenging terms and conditions of employment, the court finds that the NFLPA's role as consultant to class counsel in settling the same litigation is also lawful and appropriate. White, 822 F.Supp. P 7.23, at 1430-31. The court further concluded that the NFLPA's role in the present class action did not constitute improper inducement to union formation. Id. P 7.24 at 1431; see Shaffer v. Farm Fresh, Inc., 966 F.2d 142 (4th Cir.) (case in which union used litigation as a method by which to organize employees), cert. denied, --- U.S. ----, 113 S.Ct. 657, 121 L.Ed.2d 583 (1992); cf. Pittsburgh Steelers, Inc., No. 6-CA-23143, 1991 WL 144468, at *4 n. 8 (June 26, 1991) (as long as NFLPA's disclaimer of its union status was "otherwise unequivocal and adhered to", it was irrelevant that the disclaimer "was motivated by 'litigation strategy,' i.e., to deprive the NFL of a defense to players' antitrust suits").

FN87. Moreover, the Eagles' assertion that the settlement discussions constitute collective bargaining may be a willful breach of numerous agreements entered into on behalf of all of the NFL defendants, including the Eagles, promising that the NFL defendants would not attempt to mischaracterize any settlement discussions as collective bargaining. See Quinn Decl. PP 2-9, Exhs. A, B & C.

10.12 Having reached agreement on a new collective bargaining agreement, the parties have moved the court, pursuant to the requirements of the Stipulation and Settlement Agreement, [FN88] for findings concerning the applicability of the nonstatutory labor exemption to those terms of the amended Settlement Agreement that have been expressly incorporated in the new Collective Bargaining Agreement.

FN88. See Stipulation and Settlement Agreement art. II, at 19 (original version dated Feb. 26, 1993); Stipulation and Settlement Agreement art. II, at 19 (amended version dated May 6, 1993).

10.13 Various objectors initially opposed such findings, contending that they would constitute an advisory opinion. The court rejected those contentions in its order of April 30, 1993, determining that such findings would not be advisory to the extent that the relevant terms were to be incorporated in a new collective bargaining agreement. White, 822 F.Supp. P 7.25, at 1431. The court noted that a central issue in the present case, as in McNeil and Powell, is the applicability of the nonstatutory labor exemption to various NFL player rules. As part of the compromise of those issues, class counsel specifically agreed that the new rules would be protected by the labor exemption for the express term of any new collective bargaining agreement in which such rules were incorporated, and the Settlement

Agreement reflected that compromise. See Stipulation and Settlement Agreement, art. II, at 19 (original version dated Feb. 26, 1993); Stipulation and Settlement Agreement art. II, at 19 (amended version dated May 6, 1993). The court therefore concluded that it would not be advisory for the court to determine, pursuant to a joint petition by the parties to the Settlement Agreement, that the labor exemption applied to the new player employment rules to the extent that they were incorporated in a new collective bargaining agreement, and for the express term thereof. White, 822 F.Supp. P 7.25, at 1431 (citing Jensen v. United States, 743 F.Supp. 1091, 1103 (D.N.J.1990) (court's decision was not advisory where settlement agreement provided for a judicial determination of the constitutionality of certain agency procedures)).

10.14 Now that a new Collective Bargaining Agreement has been reached incorporating various terms of the amended Settlement Agreement, some objectors reassert those arguments. The requested labor exemption findings will effectuate a primary goal of the present settlement, labor and litigation peace throughout the term of the Settlement Agreement, and will clearly impact both class members and the parties to the Settlement Agreement. Accordingly, the court reaffirms its prior ruling that the labor exemption findings do not constitute an advisory opinion. Cf. City of New York v. Exxon Corp., 697 F.Supp. 677, 681 (S.D.N.Y.1988) (in the context of approving a settlement, court could properly rule on the

application of a provision of CERCLA to the case where that issue "would certainly have a substantial bearing on [non- settling] defendants' litigation strategy").

10.15 The court also reaffirms its determination that the labor exemption findings do not constitute an improper waiver of any class member's rights. White, 822 F.Supp. P 7.26, at 1431 (citing Alexander, 1977-2 Trade Cas. (CCH) P 61,730, at 72,991, 1977 WL 1497, at *9 ("[a]ny settlement or consent order would have had to deal with future rules in order to afford appropriate relief to plaintiffs and to be acceptable to the defendants")).

10.16 The court further concludes that, in the present context, findings with respect to the reconstitution and recognition of the NFLPA as the players' union are not within the primary jurisdiction of the NLRB. The nonstatutory labor exemption is a judicially created doctrine, [FN89] and the definition of its scope and application must be made by the federal courts, not the NLRB. In order to determine whether the nonstatutory labor exemption applies to the provisions of the Settlement Agreement that have been incorporated into the new Collective Bargaining Agreement, the court must make preliminary findings that the Collective Bargaining Agreement has been negotiated at arm's length by a valid collective bargaining representative, and that the terms of the agreement are mandatory subjects of collective bargaining. In McNeil, the court held that the nonstatutory labor exemption had ended because the NFLPA was no longer a union, thereby rejecting the NFL's

argument that such a determination could only be made by the NLRB. See Powell, 764 F.Supp. at 1356-57 (holding only in McNeil). The court now finds that the NFLPA has been validly reconstituted as a union as a necessary predicate to its ruling on the applicability of the nonstatutory labor exemption. The court therefore rejects any claims that the findings concerning the nonstatutory labor exemption are within the NLRB's primary jurisdiction.

FN89. See, e.g., Mackey, 543 F.2d at 614 (construing Supreme Court precedent and applying nonstatutory labor exemption to a dispute between players and the NFL concerning the Rozelle Rule); see generally Jonathan S. Shapiro, Note, Warming the Bench: The Nonstatutory Labor Exemption in the National Football League, 61 Fordham L.Rev. 1203, 1205-08 (1993) (discussing the history of the nonstatutory labor exemption and noting that "[t]wo strands of federal labor law are braided into the judicially created nonstatutory exemption: the protection of unions from antitrust actions by the Clayton and Norris-LaGuardia Acts and the congressional policy to promote collective bargaining as expressed in the National Labor Relations Act") (footnotes omitted).

10.17 Based on the foregoing, the court grants the motion for further factual findings concerning the scope of the nonstatutory labor exemption, and makes the following findings.

10.18 Under Mackey, the nonstatutory labor exemption immunizes collectively bargained provisions that: (1) primarily affect the parties to a collective bargaining agreement; (2) concern a mandatory subject of collective bargaining; and (3) are the product of bona fide arm's length bargaining. 543 F.2d at 614. Examining those factors, the court first finds that all of the provisions which are set forth in the amended Settlement Agreement and which have been incorporated in the new Collective Bargaining Agreement, including those relating to the College Draft, the Entering Player Pool, Veteran Free Agency, Franchise and Transition Players, the Final Eight Plan, the Guaranteed League-wide Salary, the Salary Cap and Minimum Team Salary, are provisions that relate to wages, hours, and other terms and conditions of employment. See 29 U.S.C. s 159(a) (1988) (mandatory subjects of collective bargaining concern the "rates of pay, wages, hours of employment, or other conditions of employment"). Similar provisions have routinely been deemed mandatory subjects of collective bargaining affecting primarily the parties to a collective bargaining agreement. See, e.g., Powell, 930 F.2d at 1298-99 (first refusal/compensation system primarily affected only parties in the collective bargaining relationship and concerned a mandatory subject of collective bargaining); Mackey, 543 F.2d at 615-16 (finding that the Rozelle Rule met the first two requirements of the nonstatutory labor exemption test, that is, the Rule primarily affected the parties to a collective

bargaining agreement and was a mandatory subject of collective bargaining); Zimmerman v. National Football League, 632 F.Supp. 398, 403-06 (D.D.C.1986) (applying Mackey test, and finding that supplemental draft was a mandatory subject of collective bargaining which affected primarily the parties to the collective bargaining relationship); cf. Wood v. National Basketball Ass'n, 809 F.2d 954, 962 (2d Cir.1987) (NBA draft and salary cap were mandatory subjects of collective bargaining affecting primarily the parties to the collective bargaining relationship). The court further concludes that the undisputed evidence, including the affidavits and declarations of the principals involved in negotiating the new Collective Bargaining Agreement, demonstrates that the provisions are the product of bona fide arm's length negotiations.

10.19 Accordingly, the court makes the following additional findings: (a) Those provisions of the new Collective Bargaining Agreement which embody all or a portion of the terms of the amended Settlement Agreement were bargained for in good faith. (b) Those provisions are mandatory subjects of collective bargaining and affect primarily the parties to the Collective Bargaining Agreement. (c) Adherence to those terms of the Collective Bargaining Agreement during the express term of the Collective Bargaining Agreement is protected by the nonstatutory labor exemption to the antitrust laws. (d) The application, if any, of the nonstatutory labor exemption

following expiration of the express term of the Collective Bargaining Agreement will be determined in accordance with Article XVIII, Paragraph 5 of the amended Settlement Agreement.

XI. THE COURT HAS JURISDICTION OVER THE WHITE CLASS

11.1 Various objectors again dispute the court's exercise of jurisdiction over absent, nonresident class members. The court overrules those objections, and reaffirms its prior determination that it has appropriate jurisdiction to properly adjudicate the claims of all class members, including those of absent, nonresident class members.

11.2 In making this determination, the court relies on its findings that the White settlement class was properly certified as a mandatory class pursuant to Federal Rule of Civil Procedure 23(b)(1), and that due process does not require that absent class members be provided with a right to opt out of the White class. See supra ss II-III, White, 822 F.Supp. ss II-III, at 1402- 12.

The court further relies on its jurisdiction to enjoin various other actions pursuant to the All-Writs Act, 28 U.S.C. s 1651. [FN90] Id. P 9.3, at 1433-35; see, e.g., Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co., 342 U.S. 180, 183-84, 72 S.Ct. 219, 221, 96 L.Ed. 200 (1952) (federal courts have "an ample degree of discretion" in determining how best to administer "multiple litigation in the federal judicial system", and such discretion includes the

power to stay pending federal court actions); In re Joint Eastern & Southern District Asbestos Litig. (Eagle-Picher), 134 F.R.D. 32, 37 (E.D.N.Y. & S.D.N.Y.1990) (under the All-Writs Act, courts have jurisdiction "to certify a national class action and to stay pending federal and state cases brought on behalf of class members"); In re State of South Dakota, 692 F.2d 1158, 1162 n. 8 (8th Cir.1982) ("jurisdictional considerations under the All-Writs Act have been expanded beyond the technical notions of personal and subject matter jurisdiction"); Robertson v. National Basketball Ass'n, 413 F.Supp. 88, 90 (S.D.N.Y.1976) (enjoining separate federal lawsuit filed by an individual class member in order to protect "the jurisdiction of this court to determine this action, either by trial or by court-approved settlement"); cf. In re Baldwin United Corp., 770 F.2d 328, 337 (2d Cir.1985) ("the need to enjoin conflicting ... proceedings arises because the jurisdiction of a multidistrict court is 'analogous to that of a court in an in rem action or in a school desegregation case, where it is intolerable to have conflicting orders from different courts' ") (quotation omitted); Battle v. Liberty Nat'l Life Ins. Co., 877 F.2d 877, 882 (11th Cir.1989) (it "makes sense to consider this case, involving years of litigation and mountains of paperwork, as similar to a res to be administered").

FN90. That Act provides in relevant part that: The Supreme Court and all courts established by Act of

Congress may issue all writs necessary and appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law. 28 U.S.C. s 1651(a). In the order of April 30, 1993, that court noted that pursuant to the All- Writs Act: there is ample authority for the proposition that the court has jurisdiction to enjoin other actions even if the parties were not members of the White class. White, 822 F.Supp. P 9.3, at 1434; see, e.g., United States v. New York Tel. Co., 434 U.S. 159, 174, 98 S.Ct. 364, 373, 54 L.Ed.2d 376 (1977) ("[the power conferred by the [All-Writs] . Act extends, under appropriate circumstances, to persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order"); In re Baldwin United Corp., 770 F.2d 328, 338 (2d Cir.1985) ("[a]n important feature of the All-Writs Act is its grant of authority to enjoin and bind nonparties to an action when needed to preserve the court's ability to reach and enforce its decision in a case over which it has proper jurisdiction") (citations omitted). The court therefore rejected any claim that the motions to enjoin must be denied because it lacked personal jurisdiction over any party. White, 822 F.Supp. P 9.3, at 1434.

11.3 In its order of April 30, 1993, the court also found that various objectors had: submitted to the court's jurisdiction because they have not confined their arguments to the claim that they are beyond the court's jurisdiction, but

rather have objected to the merits of the proposed settlement. White, 822 F.Supp. P 8.1, at 1432; see Trans World Airlines, Inc. v. Mattox, 897 F.2d 773, 787 (5th Cir.1990) (concluding that intervenors had waived any objection to personal jurisdiction when their arguments went "to the heart of the issue before the district court"). [FN91]

FN91. The court therefore denied "their motions to intervene to the extent that those players [sought] to reserve their jurisdictional defenses." Id. P 8.1, at 1432-33.

11.4 Those objectors continue to argue, however, that they have not submitted to the court's jurisdiction. The court reaffirms its determination that it has personal jurisdiction over the following objectors because they have knowingly and voluntarily submitted to this court's jurisdiction: Sean Jones, Eric Allen, Leslie O'Neal, Eric Sanders, Ken Norton, Jr., Curtis Duncan, Patrick Hunter, William C. Matthews, Cris Dishman, Lomas Brown, Neil Smith, Van Waiters, Broderick Thompson and Jerry Ball. In making this determination, the court relies on the following acts: (1) a personal appearance through counsel at the April 16, 1993, hearing to argue in opposition to the court's approval of the original Stipulation and Settlement Agreement on the merits of that Agreement; [FN92]

FN92. See Transcript of Final Fairness Hearing for the Original Settlement Agreement at 133-34 (Apr. 16,

1993) (argument of counsel that settlement is fundamentally flawed because of inadequate settlement payments to class members); id. at 404-05 (argument of counsel that Franchise Player provisions do "not have to be part of the settlement" and that "[t]here is no justification for disparities" in treatment between named plaintiffs and other class members who had filed suits).

(2) at that same hearing, offering live testimony and cross-examining witnesses concerning the merits of the proposed settlement; [FN93] and

FN93. See Transcript of Final Fairness Hearing for the Original Settlement Agreement at 219-27 (Apr. 16, 1993) (cross examination of class member Steve Jordan concerning merits of case, including fairness of proposed settlement and whether Reggie White adequately represented the class because he got "a deal that was different from a substantial number of the class members"); id. at 281-90 (testimony of objector Sean Jones which challenged fairness of settlement because named plaintiffs were to receive "more money").

(3) the filing of numerous memoranda of law concerning the settlement's purported inadequacies, [FN94] motions to intervene, an expert affidavit setting forth the estimates of their own damages expert, and proposed findings of fact and conclusions of law which clearly

address not only various jurisdictional issues, but also the merits of the proposed settlement. [FN95]

FN94. For example, in a Memorandum Showing Cause Why Certain Cases Should Not Be Enjoined, dated March 18, 1993, those objectors state that they "do challenge the adequacy of the class representatives and the general and specific fairness of the settlement terms." That memorandum does not state that those players were appearing specially, or that they did not submit to this court's jurisdiction.

FN95. For example, in their proposed findings of fact and conclusions of law filed on July 14, 1993, those objectors claim that they have not consented to this court' jurisdiction, but nonetheless raise the following issues: (1) whether the settlement was negotiated in good faith; (2) alleged "conflicts of class counsel, class representative, and the NFLPA"; (3) the alleged inadequacy of representation by the NFLPA and class representatives "because of illegal and unfounded payments" under the settlement; (4) the alleged illegality of the Settlement Agreement because the NFLPA was not certified as the players' collective bargaining agent; and (5) the NFL's alleged interference with the players' right to choose a collective bargaining agent and their right to adequate representation by class representatives by improperly recognizing and negotiating with the NFLPA prior to certification.

See, e.g., Yeldell v. Tutt, 913 F.2d 533, 538-39 (8th Cir.1990) (allegation of jurisdictional defect raised in answer was insufficient to preserve jurisdictional defense where party actively participated in discovery, filed various motions, participated in a five-day trial, and filed post-trial motions); In re Real Estate Title & Settlement Servs. Antitrust Litig., 869 F.2d 760, 771 (3d Cir.) (noting that in the context of a mandatory class action "a party should be deemed to consent to personal jurisdiction if it actually litigates the adequacy of representation issue before the district court, or the underlying merits of the class action, because in such a case the party has shown a willingness to engage in extensive litigation in the forum") [FN96], cert. denied, 493 U.S. 821, 110 S.Ct. 77, 107 L.Ed.2d 44 (1989); Network Professionals, Inc. v. Network Int'l Ltd., 146 F.R.D. 179, 184 (D.Minn.1993) (even if defendants had properly raised jurisdictional defense in their answer, they clearly had waived the defense by actively participating in the lawsuit).

FN96. Accordingly, the court rejects the contention that a waiver by active participation in the litigation of the merits should not apply in the context of a mandatory class action. Although subject to mandatory class certification, the foregoing players were nonetheless free to object solely on jurisdictional grounds or to assert their personal jurisdiction defense by motion. They chose instead to appear and litigate a broad range of issues going to the

merits of the present action. See supra notes 92- 95 (listing various issues concerning the merits of this case raised by those objectors).

11.5 Accordingly, the court concludes that the foregoing players have affirmatively and voluntarily waived any and all of the jurisdictional defenses that they may have had.

XII. THE FILING OF APPEALS OF THE COURT'S ORDER OF APRIL 30, 1993 DOES NOT DIVEST THIS COURT OF JURISDICTION TO ENTERTAIN THE PRESENT MOTIONS

12.1 Various interlocutory appeals were filed from the court's order of April 30, 1993. [FN97] White v. National Football League, slip op. at 3 (D.Minn. June 2, 1993). At the hearing for preliminary approval on June 1, 1993, some of those objectors argued that the notices of interlocutory appeal deprive this court of jurisdiction over the pending matters. [FN98]

FN97. The court never entered judgment on the order of April 30, 1993. Appeals of that order were filed on behalf of: (1) Wilber Marshall; (2) Paul Gruber; (3) Byron Evans; (4) Maurice Hurst and John Fourcade; (5) Carl Lee, Mark Dusbabek, Audray McMillian, Felix Wright, Cody Risien, Mark Harper, Sammy Martin, Don Beebe and Gregory Scales; (6) Terry Orr, Shane Collins, Ron Middleton, Mark Schlereth, Kelly Goodburn, David

Gulledge, Ed Simmons, Matt Elliott, Joe Jacoby, Sidney Johnson; Kurt Gouveia, Ravin Caldwell, Mark Rypien, James Jenkins, Johnny Thomas, Eric Williams, Don Warren, Jeff Bostic, Todd Bowles, Ray Brown, Jason Buck, Earnest A. Byner, Desmond Howard, Anthony Johnson, Brian Mitchell, Ricky Sanders and Paul Siever; (7) Sean Jones, Eric Allen, Leslie O'Neal, Eric Sanders, Ken Norton, Jr., Curtis Duncan, Patrick Hunter, William C. Matthews, Cris Dishman, Lomas Brown, Neil Smith, Van Waiters, Broderick Thompson and Jerry Ball; and (8) the Philadelphia Eagles.

FN98. The order of June 2, 1993 stated that: As a result of the filing of appeals of the court's order of April 30, 1993, various other players object to the court's jurisdiction, specifically Terry Orr, Shane Collins, Ron Middleton, Mark Schlereth, Kelly Goodburn, David Gulledge, Ed Simmons, Matt Elliott, Joe Jacoby, Sidney Johnson, Kurt Gouveia, Ravin Caldwell, Mark Rypien, James Jenkins, Johnny Thomas, Eric Williams, Don Warren, Jeff Bostic, Todd Bowles, Ray Brown, Jason Buck, Earnest A. Byner, Desmond Howard, Anthony Johnson, Brian Mitchell, Ricky Sanders and Paul Siever. White, slip op. at 5 n. 5 (June 2, 1993) (citing Letter from Robert A. Brunig to the court dated May 28, 1993).

12.2 Although an appeal generally divests the district court of jurisdiction over the issues appealed, in Board of

Education v. State of Missouri, the Eighth Circuit noted that the rule "is not absolute", and held that the district court properly exercised jurisdiction despite a pending appeal where the case required continuing district court supervision, the district court expressly retained jurisdiction, and new facts had developed requiring action by a district court. 936 F.2d 993, 995-96 (8th Cir.1991); cf. id. at 995 (where order is injunctive in nature, under some circumstances district court may retain jurisdiction to modify terms of injunction despite appeal).

12.3 As previously determined in the order of June 2, 1993, the court finds that the present action is the type of case that requires ongoing court supervision. White, slip op. at 3. In addition, the court has specifically retained "jurisdiction over this action to effectuate and enforce the terms of the injunctions and Stipulation and Settlement Agreement." White, 822 F.Supp. at 1437. The court further concludes that the pending motions have been properly brought pursuant to Federal Rule of Civil Procedure 23 and represent new developments that require action by this court.

Finally, on July 22, 1993, the Eighth Circuit dismissed all appeals from this court's order of April 30, 1993, "for lack of jurisdiction." Marshall et al. v. National Football League, Nos. 93-2475MN, 93-2551MN, 93-2562MN, 93-2563MN, 93-2570MN, 93-2574MN, 93-2578MN & 93-2588MN (consolidated opinion dated July 22, 1993).

12.4 Accordingly, the court concludes that it has jurisdiction to entertain the pending motions, and rejects the jurisdictional arguments premised on the filing of various appeals. See Janousek v. Doyle, 313 F.2d 916, 920-21 (8th Cir.1963) (per curiam) ("an appeal from an interlocutory order does not divest the trial court of jurisdiction to continue with other phases of the case") (quotation omitted).

XIII. MOTION FOR SANCTIONS AGAINST THE PHILADELPHIA EAGLES

13.1 In its April 30, 1993 order, the court declined to sanction the Philadelphia Eagles despite its concern over "the Eagles' apparent disregard of the court's order of February 26, 1993, and the implausibility of the objections raised." White, 822 F.Supp. P 7.28, at 1431.

13.2 Plaintiffs again ask the court to sanction the Eagles. Although troubled by the Eagles' actions for the same reasons previously set forth in its order of April 30, 1993, the court denies the motion to sanction the Eagles.

Based on the foregoing, IT IS HEREBY ORDERED that:

1. The motion to amend the Stipulation and Settlement Agreement is granted;

2. The motion to approve the Stipulation and Settlement Agreement, as amended, is granted, and the court grants final approval of the amended version of the Stipulation and Settlement Agreement;

3. The motion for further factual findings is granted; and

4. Plaintiffs' motion to sanction the Philadelphia Eagles is denied.

Reggie WHITE, Michael Buck, Hardy Nickerson, Vann McElroy and Dave Duerson,

Plaintiffs,

v.

NATIONAL FOOTBALL LEAGUE; The Five Smiths, Inc.; Buffalo Bills, Inc.; Chicago Bears Football Club, Inc.; Cincinnati Bengals, Inc.; Cleveland Browns, Inc.; The Dallas Cowboys Football Club, Ltd.; PDB Sports, Ltd.; The Detroit Lions, Inc.; The Green Bay Packers, Inc.; Houston Oilers, Inc.; Indianapolis Colts, Inc.; Kansas City Chiefs Football Club, Inc.; The Los Angeles Raiders, Ltd.; Los Angeles Rams Football Company, Inc.; Miami Dolphins, Ltd.; Minnesota Vikings Football Club, Inc.; KMS Patriots Limited Partnership; The New Orleans Saints Limited Partnership; New York Football Giants, Inc.; New York Jets Football Club, Inc.; The Philadelphia Eagles Football Club, Inc.; B & B Holdings, Inc.; Pittsburgh Steelers Sports, Inc.; The Chargers Football Company; The San Francisco Forty-Niners, Ltd.; The Seattle Seahawks, Inc.; Tampa Bay Area NFL Football Club, Inc.;

and Pro-Football, Inc., Defendants.

Civ. No. 4-92-906.

United States District Court,

D. Minnesota,

Fourth Division.

April 30, 1993.

ORDER

DOTY, District Judge.

BACKGROUND

Plaintiffs filed the present antitrust class action on September 21, 1992, less than two weeks after a jury rendered its verdict in McNeil v. National Football League, Civ. No. 4-90-476, 1992 WL 315292 (D.Minn. Sept. 10, 1992) (special verdict). [FN1] The present action, McNeil, and most of the other litigation that the parties seek to resolve by the global settlement referenced herein, challenge various NFL player rules, including the right of first refusal/compensation component of Plan B, the college draft, the NFL Player Contract and the preseason pay rules. For many years, those and other rules have been the source of numerous disputes between players and the NFL. [FN2]

FN1. In McNeil, eight individual football players whose contracts with their National Football League ("NFL") employers expired on February 1, 1990, brought an action alleging that the NFL's right of first

refusal/compensation rules as set forth in Plan B violate Section 1 of the Sherman Act.

FN2. For example, in 1972, several players brought an action that successfully challenged a predecessor of Plan B, the Rozelle Rule. Mackey v. National Football League, 407 F.Supp. 1000 (D.Minn.1975), aff'd in part, rev'd in part, 543 F.2d 606, 610-11 (8th Cir.1976) (although not per se illegal, Rozelle Rule violates rule of reason), cert. dismissed, 434 U.S. 801, 98 S.Ct. 28, 54 L.Ed.2d 59 (1977); see also Smith v. Pro Football, Inc., 593 F.2d 1173, 1183-89 (D.C.Cir.1978) (NFL draft violates rule of reason); Brown v. Pro Football, Inc., Civ. No. 90-1071, slip op. at 19-23, 1992 WL 88039, at *9- 10 (D.D.C. March 10, 1992) (applying rule of reason, and granting plaintiffs' motion for summary judgment on defendants' antitrust liability for fixing the wages of developmental squad players for the 1989 NFL season); Kapp v. National Football League, 390 F.Supp. 73, 82-83 (N.D.Cal.1974) (NFL draft and Rozelle Rule not justified by rule of reason), judgment aff'd on other grounds, appeal dismissed in relevant part as moot, 586 F.2d 644 (9th Cir.1978), cert. denied, 441 U.S. 907, 99 S.Ct. 1996, 60 L.Ed.2d 375 (1979); see also infra notes 35 & 36 (listing various player disputes).

The five named plaintiffs [FN3] filed the present case on behalf of themselves and all other past, present, and

future NFL players similarly situated during the period specified in the second amended complaint. [FN4] Defendants are the National Football League and its twenty-eight member clubs. The complaint, which originally sought only injunctive relief, was amended to seek both antitrust injunctive relief and damages stemming from the operation of the right of first refusal rules of Plan B, the college draft, the NFL player contract and the preseason pay rules. The second amended complaint also alleges that defendants illegally fixed players' medical insurance benefits and tortiously interfered with players' prospective contracts. Defendants answered the complaint, denying all of plaintiffs' material allegations and asserting various affirmative defenses and counterclaims.

FN3. Those players are: Reggie White, Michael Buck, Hardy Nickerson, Vann McElroy and Dave Duerson.

FN4. The second amended complaint specifically encompasses: (i) all players who have been, are now, or will be under contract to play professional football for an NFL club at any time from August 31, 1987 to the date of final judgment in this action and determination of any appeal therefrom, and (ii) all college and other football players who, as of August 31, 1987, to the date of final judgment in this action and the determination of any appeal therefrom, have been, are now, or will be eligible to play football as a rookie for an NFL team. (Pls.' Second Am. Compl. at 8.)

On October 15, 1992, plaintiffs moved for a preliminary injunction that would have barred defendants from enforcing the right of first refusal/compensation rules of Plan B, or imposing any other player reservation system, on veteran NFL players whose contracts were to expire on February 1, 1993. Defendants opposed that motion, which was still pending when the parties, with the assistance of this court, reached a tentative agreement to settle this action on January 6, 1993. [FN5]

FN5. During the weeks that followed, class counsel and NFL representatives engaged in numerous meetings seeking to produce a final document that would reflect the substance of their agreement. The Stipulation and Settlement Agreement represents the culmination of those negotiations.

By order dated January 6, 1993, as amended and reaffirmed on February 17, 1993, the court certified, for the purposes of settlement, a damages and injunctive relief class pursuant to Federal Rule of Civil Procedure 23(b)(1) consisting of: (i) all players who have been, are now, or will be under contract to play professional football for an NFL club at any time from August 31, 1987 to the date of final approval of the settlement of this action and the determination of any appeal therefrom, and (ii) all college and other football players who, as of August 31, 1987, through the date of final approval of the settlement of this

action and the determination of any appeals therefrom, have been, are now, or will be eligible to play football as a rookie for an NFL team. See White v. National Football League, Civ. No. 4-92-906, slip op. (D.Minn. Jan. 6, 1993) (entered nunc pro tunc); White v. National Football League, Civ. No. 4-92-906, slip op. (D.Minn. Feb. 17, 1993); Pls.' Second Am.Compl. at 8. Those mandatory class certification orders have provided a vehicle for the settlement of, among other things, all player challenges to the Plan B veteran player reservation rules, the college draft and the preseason pay rules. The settlement is the critical step toward the final resolution of the longstanding dispute between the NFL clubs and their player-employees.

On February 26, 1993, plaintiffs and defendants entered into a Stipulation and Settlement Agreement, which encompasses the terms of the proposed settlement and is designed to bring an end to the present action and a wide range of related litigation. In an order dated February 26, 1993, based on its review of the file, record and proceedings to date, this court preliminarily approved the proposed settlement as fair, reasonable and adequate, specifically finding that: 1. The proposed settlement adequately addresses plaintiffs' predominant claim for relief, namely structural, injunctive relief because it will radically alter the NFL's system of player restraints and provide unprecedented free agency to NFL players. 2. The proposed settlement also adequately addresses plaintiffs' claim for monetary recovery, because it will provide for substantial

payments to be distributed fairly among the named plaintiffs and class members in settlement of their past claims against the NFL and its teams. 3. There are substantial novel and complex legal and factual issues involved in this case, precluding any guarantee as to certainty of outcome. 4. The establishment of damages would be uncertain, difficult, costly, and extremely time-consuming. 5. The establishment of plaintiffs' claims regarding preseason compensation are uncertain and are subject to counterclaims that may substantially affect the likelihood of any recovery. 6. Given the long history of this dispute, the parties are uniquely positioned to assess the overall reasonableness of the proposed settlement. 7. The proposed settlement was the product of good faith bargaining at arm's length between the parties. 8. Class Counsel is adequately representing the interests of the named plaintiffs and all class members. See White v. National Football League, Civ. No. 4-92-906, slip op. at 2-3 (D.Minn. Feb. 26, 1993).

In accordance with Federal Rule of Civil Procedure Rule 23(e), the court ordered plaintiffs, at their own expense, to send written notice by mail to class members. [FN6] The court also ordered plaintiffs to publish a summary notice in USA Today. Those notices, which were approved by the court, described the terms of the proposed settlement and informed all class members that a final approval hearing would be held on April 16, 1993, to determine whether the proposed settlement was fair, reasonable and adequate. The notices also informed class

members that they had a right to submit written objections and to appear at the final approval hearing, in person or by counsel, to be heard in support of, or in opposition to, the settlement, or make any other statement of their position concerning the settlement. See Notice of Class Action Settlement and Summary Notice.

FN6. On March 12, 1993, plaintiffs mailed notice to 4,957 class members who are current or former NFL players. During the week of March 8, 1993, plaintiffs mailed notices to 343 college players who attended the NFL's Rookie Combine this year.

Following a resolution of the Board of the National Football League Players Association (the "NFLPA") to seek to become the collective bargaining representative of NFL players, [FN7] in mid-January 1993, the NFLPA began to collect authorization cards from NFL players designating it as the exclusive collective bargaining representative of NFL players.

FN7. After the Eighth Circuit determined that the nonstatutory labor exemption continues to protect NFL veteran player rules as long as an "ongoing collective bargaining relationship" exists, Powell v. National Football League, 888 F.2d 559, 568 (8th Cir.1989), superseded by, 930 F.2d 1293, 1303 (8th Cir.1989), this court, in its order of May 23, 1991, determined that various actions taken by

the players and the NFLPA resulted in the termination of the NFLPA's "status as a labor organization." Powell and McNeil v. National Football League, 764 F.Supp. 1351, 1356 (D.Minn.1991) (holding only in McNeil). On June 12, 1991, the Eighth Circuit denied defendants' motion for interlocutory appeal on that ruling. McNeil, No. 91-8088 (8th Cir. June 12, 1991). The NFL defendants still maintain that the NFLPA has never ceased to function as the players' bargaining representative and thus the nonstatutory labor exemption has never ended.

By letter dated March 23, 1993, the NFLPA informed the NFL that: [a] majority of the players on 1992 season-ending rosters have now signed cards authorizing the NFLPA to represent them for purposes of collective bargaining. (Letter from Richard A. Berthelsen to Paul Tagliabue dated March 23, 1993.) After confirmation of the authenticity of the cards by an independent entity, the American Arbitration Association, the NFL voluntarily recognized the NFLPA as the exclusive collective bargaining representative of the NFL players. (Letter from Harold Henderson to Eugene Upshaw dated March 29, 1993.)

Since March 31, 1993, the NFLPA and representatives of the NFL Management Council, the multi-employer bargaining unit of the NFL owners, have been negotiating in an effort to reach a new collective bargaining agreement. [FN8] As of the date of the final

approval hearing, April 16, 1993, those negotiations remained ongoing. [FN9]

FN8. The last collective bargaining agreement between players and defendants expired in August 1987.

FN9. As of the date of this order, April 30, 1993, the NFLPA and the NFL Management Council had not yet reached agreement on a collective bargaining agreement.

This case is presently before the court on the motion of the parties for final approval of the Stipulation and Settlement Agreement, which fundamentally revises many of the employment practices at issue in this litigation. The five representative plaintiffs (all of whom are active or former NFL players), class counsel, representatives of the NFLPA, and at least twenty-eight of the twenty- nine defendants [FN10] view the proposed settlement as a fair, reasonable and adequate method of resolving this litigation. All of those parties believe that the proposed settlement advances and protects the interests of all class members, and provides the framework for labor peace within the NFL after almost six years of strife.

FN10. As discussed more fully infra, see Section VII(B), the Philadelphia Eagles object to the NFL's recognition of the NFLPA as a labor union and to any potential settlement of a related dispute over licensing

agreements, NFLPA v. NFL Properties, No. 90-CV-4244 (S.D.N.Y.) (filed June 25, 1990).

The court has an extensive record on which to evaluate the fairness, reasonableness and adequacy of the proposed settlement. In addition to voluminous submissions made by the parties in support of preliminary and final approval of the proposed settlement, the court has extensive knowledge of the issues involved in this litigation as a result of more than five years of experience presiding over the present action and its predecessors. In addition to the record in the present action, the court has full access to, and intimate familiarity with, the records in Powell, McNeil, Five Smiths v. National Football League, 788 F.Supp. 1042 (D.Minn.1992), National Football League v. National Football League Players Ass'n & Hilton, Civ. No. 4-91-877 (D.Minn. filed Oct. 15, 1991), and Jackson v. National Football League, 802 F.Supp. 226 (D.Minn.1992). Of particular help to the court is the record in McNeil, which includes the McNeil trial transcript, comprising more than 8400 pages, and the evidence received in McNeil, which includes over 400 trial exhibits. The testimony and evidence received in the foregoing cases has also been supplemented by arguments of counsel and numerous legal memoranda.

In a total class of well over 5,000 players, seventy-three objections were filed on behalf of active or former NFL players. [FN11] In addition, objections were

filed on behalf of one NFL member club, the Philadelphia Eagles, sixteen college players, [FN12] and one player agent. [FN13]

FN11. As of the deadline for filing objections, April 2, 1993, the following active or former NFL players had filed objections: Wilber Marshall, Paul Gruber, Brian Washington, Carl Lee, Mark Dusbabek, Audray McMillian, Felix Wright, Cody Risien, Mark Harper, Sammy Martin, Mike Farr, Pepper Johnson, Don Beebe, Gregory Scales, Gregory J. Baty, Barry Sanders, Luis Sharpe, Steve Atwater, Horatio Benny Blades, James Hasty, Byron Evans, Michael C. Johnson, Reggie Langhorne, Maurice Hurst, John Fourcade, Sean Jones, Eric Allen, Leslie O'Neal, Eric Sanders, Ken Norton, Jr., Curtis Duncan, Patrick Hunter, William C. Matthews, Cris Dishman, Lomas Brown, Neil Smith, Van Waiters, Broderick Thompson, Terry Orr, Shane Collins, Ron Middleton, Mark Schlereth, Kelly Goodburn, David Gulledge, Ed Simmons, Matt Elliott, Joe Jacoby, Sidney Johnson, Kurt Gouveia, Ravin Caldwell, Mark Rypien, James Jenkins, Johnny Thomas, Eric Williams, Don Warren, John Elliott, Duane Bickett and Steve Young. Since April 2, 1993, additional objections have been filed on behalf of Brian Blades, Roland James, Pat Carter, Kenneth F. Ruettgers, Jerry Ball, Jeff Bostic, Todd Bowles, Ray Brown, Jason Buck, Earnest A. Byner, Desmond Howard, Anthony Johnson, Brian Mitchell, Ricky Sanders and Paul Siever. At the hearing, the court granted

all motions to extend time, ruling that all objections filed as of the hearing date, April 16, 1993, would be considered by the court, whether such objections were timely filed or not. The court further ruled that April 16, 1993, was the deadline for objections, and that it would not consider any objections filed after that date. The Tice action, another case involving preseason claims, was originally filed in the District of Columbia, and transferred to this court by order of Judge Royce C. Lamberth dated February 10, 1993. Tice v. National Football League, 812 F.Supp. 255 (D.D.C.1993); Tice, Civ. No. 4-93-166 (D.Minn. transferred Feb. 10, 1993). At the preliminary approval hearing, some of the Tice plaintiffs objected to the settlement of the preseason pay claims within the context of White. Those objections, however, were withdrawn for purposes of final approval of the settlement, although a few players have filed individual objections to the settlement of the preseason pay within the scope of the White class action. See, e.g., Letter of Gregory J. Baty dated March 31, 1993 ("the Tice case regarding preseason pay claims should not have been included in any Reggie White settlement").

FN12. One college player, Brian Pressler, filed a timely objection, purportedly on behalf of himself and all other present and future "college and other football players" similarly situated. Untimely objections were filed on behalf of college players Jesse Becton, Scott Brown, Rudy

Thompson, Ernie Lewis, Eugene Brown, Percy Coleman, James Chinn, Ron Alexander, Brad LaCombe, Dan Purcell, Steve Ross, Ron Moran, Steve Robinson, Garrett Washington and Bennie Hargro.

FN13. Robert J. Sheridan, who represents the sixteen college player- objectors, filed the objection purportedly on behalf of himself, and all other present and future agents and attorney-agents similarly situated.

The court's evaluation of the proposed settlement must necessarily proceed in light of the McNeil jury verdict. Following a ten-week trial, from June 15 to September 10, 1992, the jury returned its special verdict, finding that the Plan B right of first refusal/compensation rules (1) had "a substantially harmful effect on competition in the relevant market for the services of professional football players"; (2) "significantly contribute[d] to competitive balance in the NFL"; and (3) were "more restrictive than reasonably necessary to achieve ... competitive balance." See McNeil v. National Football League, Civ. No. 4-90-476, 1992 WL 315292, at *1 (D.Minn. Sept. 10, 1992) (special verdict form). Although the jury found that all plaintiffs had suffered antitrust injury, it awarded damages to only four of the eight plaintiffs in the total amount of $543,000, before trebling. [FN14] See id.

FN14. The jury awarded the following damages

before trebling: Mark Collins, $178,000; Don Majkowski, $0; Tim McDonald, $0; Freeman McNeil, $0; Frank Minnifield, $50,000; Niko Noga, $0; Dave Richards, $240,000; and Lee Rouson, $75,000. See id. at *2.

Because the parties reached a tentative agreement to settle the present litigation before the court entered final judgment in McNeil, defendants were unable to file an appeal. [FN15] Thus, neither the liability nor damages issues in McNeil have been finally resolved.

FN15. By order dated November 11, 1992, the court stayed entry of the McNeil judgment pending resolution of various post-trial motions and any appeal. At the time the tentative settlement was reached, various post- trial motions were still pending in McNeil.

Defendants believe that an appeal of the McNeil verdict would present complex and unsettled questions regarding the NFL's antitrust liability arising from the operation of Plan B including, among other things, the scope of the nonstatutory labor exemption, the application of the rule of reason under Section 1 of the Sherman Act, [FN16] and the court's instructions regarding burden of proof and antitrust injury. Although plaintiffs disagree with defendants' position, the court notes that the foregoing issues are complex and difficult, and thus present significant issues for appellate review. [FN17]

FN16. See McNeil v. National Football League, 790 F.Supp. 871, 896-97 (D.Minn.1992) (finding that plaintiffs' Plan B claim should be evaluated under the rule of reason).

FN17. Defendants raised those issues in various post-trial motions on which this court has never ruled, although on January 6, 1993, it was prepared to do so in the event that the parties failed to reach a tentative settlement. The court previously certified the nonstatutory labor exemption issue to the Eighth Circuit in McNeil, finding that there exists a "substantial ground for difference of opinion". Powell and McNeil, 764 F.Supp. at 1359 (holding only in McNeil); compare e.g., Powell, 930 F.2d at 1304 (nonstatutory labor exemption applies as long as the "labor relationship continues"); with e.g., Brown v. Pro Football, Inc., 782 F.Supp. 125, 130-33 (D.D.C.1991) (rejecting Eighth Circuit's holding in Powell, and finding that exemption ends when collective bargaining agreement expires); see Bridgeman v. National Basketball Ass'n, 675 F.Supp. 960, 964-67 (D.N.J.1987) (rejecting both expiration of collective bargaining agreement and negotiating impasse as point at which exemption terminates, and finding that the exemption continues as long as the employer "reasonably believes that the challenged practice or a close variant of it will be incorporated in the next collective bargaining agreement").

The nature and extent of damages that plaintiffs or

other class members might recover as a result of the operation of Plan B would also be subject to significant uncertainties. In McNeil, the only Plan B case tried to date, the jury made clear that such damages are difficult to prove, awarding monetary damages to only four of the eight plaintiffs despite the fact that it found all eight had suffered economic injury as a result of the Plan B rules. McNeil, 1992 WL 315292, at *1-2; see also Jackson v. National Football League, 802 F.Supp. 226, 231 (D.Minn.1992) (many economic injuries alleged by professional football players "may be impossible to quantify in monetary terms", a difficulty "further confirmed by the jury's [verdict] in McNeil "). The court further notes that the McNeil plaintiffs proffered substantial evidence to support their damage claims.

Based on the extensive evidence and argument presented during the settlement approval process, as well as the entire records in Powell, McNeil, Five Smiths, Hilton, Jackson and White, the court has been afforded a comprehensive view of the workings of the NFL and the employment practices of its member clubs, the collective bargaining and labor relations history within the NFL, the nature and effects of the right of first refusal/compensation rules and other player-related rules, the terms of the proposed settlement and the nature and likely effect of the proposed NFL player rules.

Against this background, and for the reasons stated below, the court grants the motions for approval of the

Stipulation and Settlement Agreement, overrules all objections to the settlement, grants defendants' motions to enjoin various other cases and denies the motions to intervene except to the extent that various movants shall be permitted to intervene as intervenor- objectors solely for purposes of preserving their right to appeal the judgment entered by this court in connection with the Stipulation and Settlement Agreement.

I. PROPER NOTICE WAS GIVEN TO THE CLASS OF THE PROPOSED CLASS CERTIFICATION AND SETTLEMENT

1.1 The court has evaluated whether the proposed settlement is fair, reasonable and adequate using the two-stage procedure suggested in the Manual for Complex Litigation, s 30.44, at 241-42 (2d ed. 1985). The first stage involved the court's preliminary determination of whether the proposed settlement was "within the range of possible approval," and whether class members should be notified of the terms of the proposed settlement and the date of a final fairness hearing to determine whether the court should grant final approval. On February 26, 1993, the court determined that the proposed settlement fell within the range of possible approval, and thus the class should be notified of its terms and the date on which the court would conduct a final fairness hearing, April 16, 1993.

The second stage of the court's settlement evaluation process involved sending notice to the class, which described the settlement and allowed class members to file

objections to the settlement prior to the final approval hearing. The notice further provided that objectors would have an opportunity to appear and be heard at the final approval hearing.

1.2 As the court previously ruled in its February 26, 1993, order granting preliminary approval, notice of the proposed settlement and of the final approval hearing on April 16, 1993, was proper and adequate as to timing, content and means of transmission. [FN18]

FN18. The court rejects the contention, made by the agent representing the sixteen college players, that the notice mailed by plaintiffs differed substantially from that approved by the court. Other than various format changes, the notices were identical.

1.3 Class members were given extensive and proper court-approved notice of the proposed class certification and settlement. The objectors had an adequate and reasonable opportunity to formulate and present meaningful objections to the proposed settlement. In all, nearly five weeks were available for the preparation and filing of objections between preliminary approval of the proposed settlement on February 26, 1993, and the deadline for filing such objections on April 2, 1993. Some four weeks were available between the publication of the Summary Notice in the March 3, 1993, edition of USA Today, and the deadline for filing objections. Finally, a full three weeks were available for

the preparation and filing of objections between the initial mailing of the Notice of Class Action Settlement on March 12, 1993, and the April 2, 1993 filing deadline. [FN19]

FN19. Moreover, as previously noted, at the final fairness hearing the court ruled that it would consider all objections filed on or before April 16, 1993. In addition, the court contacted all counsel who appeared at that hearing, and permitted them to submit proposed findings by April 23, 1993. The court considered all proposed findings received as of that date, including those filed on behalf of the college player-objectors, the Philadelphia Eagles, Wilber Marshall, the Washington Redskins player-objectors, Sean Jones, Eric Allen, Leslie O'Neal, Eric Sanders, Ken Norton, Jr., Curtis Duncan, Patrick Hunter, William C. Matthews, Cris Dishman, Lomas Brown, Neil Smith, Van Waiters, Broderick Thompson, Jerry Ball, Maurice Hurst, John Fourcade, Carl Lee, Mark Dusbabek, Audray McMillian, Felix Wright, Cody Risien, Mark Harper, Sammy Martin, Mike Farr, Pepper Johnson, Don Beebe, Gregory Scales, Brian Blades and Pat Carter.

1.4 With respect to the formal fairness hearing on April 16, 1993, the following notice was given:

(a) On March 12, 1993, court-approved notice of the April 16, 1993, hearing and summary of the terms of the proposed settlement was mailed by first-class mail, postage prepaid, to all persons whom the parties were able to

determine, through their best efforts, are class members, and with respect to whom the parties have been able to obtain a current or last-known mailing address.

(b) Court-approved Summary Notice of the April 16, 1993, hearing was also published in the March 8, 1993, edition of USA Today, a daily national newspaper, with a circulation of approximately 1,840,000.

1.5 The court finds that the mailed and published notices clearly satisfy both Rule 23 and due process requirements. Overall, approximately 5,300 notices were mailed to potential class members, including 4,957 notices to current or former NFL players, [FN20] and 343 notices to graduating college players who attended the NFL's 1993 Rookie Combine in Indianapolis. [FN21] Of those, a total of 458, or less than ten percent, were returned by the Postal Service as undeliverable. Of the 458 returned notices, 300 were re-mailed to newly located addresses. [FN22] Mailed notice was directed to the current or last- known addresses of 2,507 of the approximately 2,902 class members (almost eighty-seven percent) entitled to money distributions from the settlement fund. In addition to the Notice of Class Action Settlement, each mailed notice also included an estimate of the settlement payment, if any, that the class member was due to receive. See Grunin v. International House of Pancakes, 513 F.2d 114, 121 (8th Cir.) ("individualized notice by mail to the last known address [is] the 'best notice practicable' in a class action contest", quoting Eisen v. Carlisle & Jacquelin, 417 U.S. 156,

174-77, 94 S.Ct. 2140, 2151-52, 40 L.Ed.2d 732 (1974)), cert. denied, 423 U.S. 864, 96 S.Ct. 124, 46 L.Ed.2d 93 (1975).

FN20. Levine Aff. PP 2-3.

FN21. The court thus rejects Mr. Sheridan's allegation that the NFLPA obstructed notice to college players by refusing to mail out requested copies until March 31, 1993. During the week of March 8, 1993, notices were mailed to 343 top college players who attended the NFL's Rookie Combine in Indianapolis this year. (Berthelsen Supp.Aff. P 22; Quinn Supp.Aff. P 34.) The NFLPA and class counsel promptly mailed notices to all class members who requested a copy. Mr. Sheridan also spent several hours at the NFLPA's offices discussing the terms of the proposed settlement with staff members. (Berthelsen Supp.Aff. P 27.)

FN22. The NFLPA sought to obtain the addresses of all persons whose notices were returned as undeliverable; such efforts included contacting class members' last known representative. (Levine Aff. P 3.)

1.6 The court finds that the mailed and published notices of the April 16, 1993, hearing were reasonably calculated, under all of the circumstances of NFL football, to apprise interested parties of the proposed settlement and

afford them an opportunity to present their objections. See, e.g., Reynolds v. National Football League, 584 F.2d 280, 285 (8th Cir.1978); Grunin, 513 F.2d at 120 ("the mechanics of the notice process are left to the discretion of the court subject to the broad 'reasonableness' standards imposed by due process" (citations omitted)). The mailed and published notices fairly, reasonably and adequately conveyed to class members the requisite information concerning the proposed settlement, and afforded a reasonable time in which class members could formulate and file their objections, if any, to the proposed settlement. [FN23] See id. at 121; cf. 2 Herbert Newberg & Alda Conte, Newberg on Class Actions s 11.57, at 11-140 (3d ed. 1992) ("the period from receipt of notice until the actual settlement hearing is often 30 days or less").

FN23. The court also rejects the contention that notice in the present case was inadequate because it was not identical to that provided in Alexander v. National Football League, 1977-2 Trade Cas. (CCH) P 61,730, 1977 WL 1497 (D.Minn.1977). When affirming the Alexander settlement in Reynolds, the Eighth Circuit determined that: Due process requires that notice of a hearing to review the compromise of a class suit be structured in terms of content in a manner that enables class members rationally to decide whether they should intervene in the settlement proceedings or otherwise make their views known, and if they choose to become actively involved, to have sufficient opportunity to

prepare their position. Reynolds v. National Football League, 584 F.2d at 284 (citations omitted). Applying the Reynolds standard to the notice given in the present case, the court finds that it was sufficient to allow class members to rationally determine whether they should either intervene or otherwise object. Moreover, in Alexander there were "approximately 2,060 class members for whom no accurate mailing addresses were available." 1977-2 Trade Cas. (CCH) P 61,730, at 72,988, 1977 WL 1497, at *7. Thus, the notice in Alexander was arguably inferior to that given in the present action.

1.7 The Eighth Circuit has further noted that "[c]lass members are not expected to rely on the notices as a complete source of settlement information." Grunin, 513 F.2d at 122 (citation omitted). As the notices suggested, class members could, and many did, obtain complete copies of the underlying documents from the court, and obtain further explanation of the proposed settlement from class counsel, the NFLPA, or their own agents or attorneys. See id. at 122 (due process does not require that a copy of the entire proposed settlement agreement be included with the mailed notice).

1.8 Moreover, in addition to the court-ordered notice, the NFLPA and class counsel have provided significant additional notice of the settlement to thousands of class members and their representatives. (Berthelsen Supp.Aff. PP 22-25); see Alexander, 1977-2 Trade Cas.

(CCH) P 61,730, at 72,989, 1977 WL 1497, at *7 (circumstances that increase the effectiveness of published notice to professional football players include "the fact that many class members are represented by agents or attorneys who stay conversant with player-club developments"). Specifically, in early February, the NFLPA mailed information regarding the proposed settlement agreement to 670 player agents who represent approximately ninety-five percent of all NFL players; on March 1, 1993, the NFLPA conducted a seminar concerning the settlement which was attended by approximately 175 of those agents; and on March 9, 1993, the NFLPA mailed all of those agents a copy of the court-ordered notice. (Berthelsen Supp.Aff. P 24.) The NFLPA also conducted numerous meetings with NFL players in which it explained and answered questions concerning the Settlement Agreement. Representatives of the NFLPA have also spoken to hundreds of players and agents on the phone about the proposed settlement. The notice provided directly to class members was thus far broader than that required by the court's order of February 26, 1993.

1.9 Finally, in addition to the notice provided to class members directly by the parties and the NFLPA, the Settlement Agreement has received extensive media coverage, affording class members with substantial additional notice. Immediately after reaching a settlement in principle on January 6, 1993, the parties released a joint press statement setting forth the major points of the parties'

agreement. As a result, over the next few days, virtually every major newspaper in the United States printed extensive descriptions of the proposed settlement. Since then, there have been hundreds of newspaper and magazine articles and television and radio reports discussing the settlement. Over the past three and one-half months, there has been nearly daily coverage reviewing the terms and operation of the Settlement Agreement. In Alexander, the court recognized that such media coverage increases the effectiveness of the formal notice provided by the parties. 1977-2 Trade Cas. (CCH) P 61,730, at 72,989, 1977 WL 1497, at *7. As evidence of this, the court noted at the final fairness hearing that at least one objector, Wilber Marshall, filed his objection prior to formal notice being mailed or published. [FN24] White, Transcript of Final Fairness Hearing at 14 (Apr. 16, 1993).

FN24. Marshall filed an objection on March 2, 1993.

1.10 Based on the foregoing, and all other evidence before the court, the court finds that pursuant to the requirements of Rule 23 and due process, proper notice of the proposed class certification and terms of the settlement was given to class members.

II. A DEFINABLE CLASS EXISTS THAT SATISFIES THE REQUIREMENTS OF FEDERAL RULE OF CIVIL PROCEDURE 23(b)(1)

2.1 Federal Rule of Civil Procedure 23(a) explicitly sets forth four prerequisites to class certification: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the class representatives are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Two additional implicit requirements of Rule 23(a) are: "(1) the existence of a precisely defined class; and (2) that the class representatives are members of the proposed class." Powell v. National Football League, 711 F.Supp. 959, 966 (D.Minn.1989) (citation omitted); see also In re Worker's Compensation, 130 F.R.D. 99, 103 (D.Minn.1990); 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure ss 1760-61 (2d ed. 1986).

2.2 In addition to meeting the requirements of Rule 23(a), the proposed class must also satisfy one of the three subsections of Rule 23(b), specifically that: (1) the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability

to protect their interests; or (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

2.3 The requirements for class certification are more readily satisfied in the settlement context than when a class has been proposed for the actual conduct of the litigation. See, e.g., Bowling v. Pfizer, Inc., 143 F.R.D. 141, 157-58 (S.D.Ohio 1992) ("[t]he rationale behind the loosening of the requirements is to encourage sweeping settlements of complex disputes"); In re A.H. Robins, 85 B.R. 373, 378 (Bankr.E.D.Va.1988), aff'd, 880 F.2d 709, 738-40 (4th Cir.), cert. denied, 493 U.S. 959, 110 S.Ct. 377, 107 L.Ed.2d 362 (1989); see also 2 Herbert Newberg & Alba Conte, Newberg on Class Actions s 11.28, at 11-57 & n. 142 (3d ed. 1992) (citing Robins).

A. Definability

2.4 The court determines that in the present case, a definable settlement class exists consisting of: (1) all players who have been, are now, or will be under contract to play professional football for an NFL club at any time from August 31, 1987, to the date of final approval of the

settlement of this action; and (2) all college and other football players who have been, are now, or will be eligible to play football as a rookie for an NFL team at any time from August 31, 1987, to the date of final approval of the settlement of this action.

2.5 That class is neither amorphous nor imprecise, and is substantially identical in nature to classes that previously have been certified in cases challenging restraints on competition for player services in professional sports leagues that resulted in analogous class-wide settlements. See Alexander, 1977-2 Trade Cas. (CCH) P 61,730, at 72,985, 1977 WL 1497, at *2 (D.Minn.1977) (discussing its certification of a class consisting of "all professional football players who have been under contract to one or more NFL clubs at any time from September 17, 1972, to March 1, 1977"), aff'd sub nom. Reynolds v. National Football League, 584 F.2d 280, 283-84 (8th Cir.1978) (in addition to damage claims, noting the broad scope of injunctive relief originally sought in Alexander, although such relief ultimately became unnecessary when a collective bargaining agreement was reached); Bridgeman v. National Basketball Ass'n, Civ. No. 87-4001, slip op. (D.N.J. Apr. 18, 1988); Robertson v. National Basketball Ass'n, 389 F.Supp. 867, 900-01 (S.D.N.Y.1975), aff'd, 556 F.2d 682, 685 (2d Cir.1977).

2.6 The settlement class is well defined and discrete because all individuals who have been under contract or eligible to play for an NFL team as a rookie since August

31, 1987, are readily identifiable by name. See Alexander, 1977-2 Trade Cas. (CCH) P 61,730, at 72,989, 1977 WL 1497, at *7 (citing Robertson, 389 F.Supp. at 897); accord Powell, 711 F.Supp. at 968-69. The court further determines that this prerequisite is not defeated by the inclusion of a well-defined group of players who will enter or become eligible to enter the NFL in the future because the court will be able to determine, at any given time, whether a particular individual is a member of the White class. Robertson, 389 F.Supp. at 896-97 ("the fact that fifty to a hundred more [players] may be joining the class does not make it unmanageable"); cf. Probe v. State Teachers' Retirement Sys., 780 F.2d 776, 780 (9th Cir.) ("[t]he fact that [a mandatory] class includes future members does not render the class definition so vague as to preclude certification" (citation omitted)), cert. denied, 476 U.S. 1170, 106 S.Ct. 2891, 90 L.Ed.2d 978 (1986).

B. Representativeness

2.7 The named plaintiffs were all under contract to an NFL team, and subject to the challenged system of player restraints, during the relevant period. Thus, they are all members of the settlement class they seek to represent.

C. Numerosity

2.8 As the settlement class consists of more than 5000 persons who are widely dispersed throughout the United States, joinder is impracticable. Powell, 711 F.Supp. at 969; State of Minnesota v. United States Steel Corp., 44 F.R.D. 559, 566 (D.Minn.1968) (requirement met where

"problems of management and administration would be rendered extremely cumbersome and difficult by joinder of all absentee members"); Alexander, 1977-2 Trade Cas. (CCH) P 61,730, at 72,989, 1977 WL 1497, at *8.

D. Commonality

2.9 Commonality "does not require that every question of fact or law be common to every member of the class"; rather, the requirement is met where the questions linking the class members are " 'substantially related to the resolution of the litigation even though the individuals are not identically situated.' " Paxton v. Union Nat'l Bank, 688 F.2d 552, 561 (8th Cir.1982) (citations and quotation omitted), cert. denied, 460 U.S. 1083, 103 S.Ct. 1772, 76 L.Ed.2d 345 (1983); Hedge v. Lyng, 689 F.Supp. 884, 889- 90 (D.Minn.1987) (requirement satisfied where the plaintiff challenged the validity of rules that were common to the class). Differences in the amount of monetary recovery to which particular class members may be entitled also do not defeat the propriety of class certification of a settlement class. Alexander, 1977-2 Trade Cas. (CCH) P 61,730, at 72,990, 1977 WL 1497, at *9 ("[u]nder the proposed settlement, members of the class will receive different settlement payments based on certain factors, but this difference in payment will not bar class status"); Robertson, 389 F.Supp. at 898 n. 57 (difference in individual settlement damages will not preclude class certification); cf. Brown v. Pro Football, Inc., 146 F.R.D. 1, 2 (rejecting NFL defendants' motion to decertify a player

class based on defendants' contention that "all that remains is the individualized issue of damages").

2.10 The claims of each member of the settlement class involve common questions of law and fact. Defendants have imposed various rules "in substantially identical manner to all players within the NFL." Alexander, 1977-2 Trade Cas. (CCH) P 61,730, at 72,989, 1977 WL 1497, at *8. Thus, each member of the class was, or would have been, subject to the same system of player restraints, which operated to prevent them from freely offering their services to NFL teams in a competitive market. The court therefore determines that the commonality requirement is satisfied. Id.; Powell, 711 F.Supp. at 969; Robertson, 389 F.Supp. at 898.

E. Typicality

2.11 The claims of the named plaintiffs are typical of the claims of the settlement class. The "typicality" requirement is met " 'if the claims or defenses of the representatives and the members of the class stem from a single event or are based on the same legal or remedial theory.' " Paxton, 688 F.2d at 561-62 (quotation omitted); In re Workers' Compensation, 130 F.R.D. at 105. In other words, the named plaintiffs must have the same or similar grievances as the members of the class. Dirks v. Clayton Brokerage Co., 105 F.R.D. 125, 133 (D.Minn.1985) (citing Donaldson v. Pillsbury, 554 F.2d 825, 830 (8th Cir.), cert. denied, 434 U.S. 856, 98 S.Ct. 177, 54 L.Ed.2d 128 (1977)). In the present case, the named plaintiffs and class

members either have been, or would have been, subject to the same system of restraints. Thus, all players have a similar interest in altering that existing system. Robertson, 389 F.Supp. at 898. Moreover, "the complaint alleges no claims peculiar to the named plaintiffs." Alexander, 1977-2 Trade Cas. (CCH) P 61,730, at 72,990, 1977 WL 1497, at *8. The court thus concludes that for settlement purposes, the typicality requirement is met. Id.; Robertson, 389 F.Supp. at 898; cf. Powell, 711 F.Supp. at 969.

F. Adequacy Of Representation

2.12 The purpose of the "adequacy" requirement is to ensure that the class representatives "will vigorously prosecute the interests of the class." Paxton, 688 F.2d at 562-63; In re Workers' Compensation, 130 F.R.D. at 107. The requirement has two elements: (1) that the class representatives and their counsel will competently and vigorously prosecute the lawsuit; and (2) that the interests of the class representatives are not adverse to those of the class members. Paxton, 688 F.2d at 562-63; In re Workers' Compensation, 130 F.R.D. at 107.

2.13 The court first finds that plaintiffs' counsel have the experience and competence to provide adequate representation to all class members, as evidenced by their performance on behalf of player plaintiffs in a number of analogous cases, including Alexander and Robertson, [FN25] as well as Powell, McNeil, Hilton, Jackson and Five Smiths, all of which were before this court. [FN26] See Alexander, 1977-2 Trade Cas. (CCH) P 61,730, at

73,006, 1977 WL 1497, at *32 (noting that prior expertise exists to "a remarkable degree" where counsel served as chief attorney in both Mackey and Alexander). [FN27]

FN25. James W. Quinn, class counsel in the present action, as well as counsel in Powell, Five Smiths, Hilton, McNeil and Jackson, was also class counsel in the Robertson litigation.

FN26. The court thus has substantial personal basis on which to judge the experience and competence of class counsel.

FN27. The Alexander court was referring to Edward M. Glennon, who was players' counsel in Mackey, and was instrumental in settling Alexander, the class action arising in the wake of Mackey. Mr. Glennon was also class counsel in Powell, players' counsel in McNeil and Jackson, and class counsel in the present action.

2.14 Several objectors contend, however, that class counsel's loyalty to the class has been compromised as a result of counsel's representation of the NFLPA, as well as individual players, in various other lawsuits. The court concludes, however, that class counsel's participation in other, closely related lawsuits which have been also supported by the NFLPA, does not create any conflict between class counsel and members of the class. In fact,

rather than creating conflict, the experience gained thereby was likely a prerequisite to the parties' ultimate agreement to settle. Moreover, the global nature of the settlement reflects the interrelationship of the players' struggle, which was supported both by individual players and the NFLPA. Indeed, two of those actions, McNeil and Jackson, were crucial to the present class action settlement. [FN28]

FN28. The court notes that class counsel's handling of various related actions, beginning with Powell and continuing through White, has been exemplary.

In the Alexander class action settlement, the court approved a settlement in which class counsel also functioned as counsel to the NFLPA, finding that such representation did not render class counsel inadequate or impair the negotiated settlement of the various class claims. Alexander, 1977-2 Trade Cas. (CCH) P 61,730, at 72,990, 73,002, 1977 WL 1497, at *8, *27 (in approving settlement, noting that NFLPA funded both Alexander and Mackey, and that class counsel also represented the NFLPA).

After presiding over lengthy litigation in which class counsel represented both players and the NFLPA, the court similarly determines that class counsel competently and vigorously represented the interests of both individuals players, as in McNeil and Jackson, and class members, as in Powell and the present action. [FN29]

FN29. In his order of February 10, 1993, transferring the Tice action to this court, Judge Royce C. Lamberth raised various potential concerns regarding class counsel in the present case. Tice v. National Football League, 812 F.Supp. 255 (D.D.C.1993). Class counsel in the present case, however, was only tangentially involved in the Tice litigation. The court determines that those concerns never materialized, relying on: arguments and memoranda submitted at the preliminary hearing, this court's substantial experience with class counsel in the present action, as well as in McNeil, Jackson, Hilton, Five Smiths, and Powell, its determination that class counsel have fairly and adequately represented the entire class, class counsel's termination of its representation of the NFLPA in the licensing litigation, and the withdrawal of plaintiffs and counsel's objections in Tice.

2.15 The NFLPA has paid most of class counsel's fees as they have accrued, and class counsel will not seek recovery from the class settlement fund. (Quinn Aff. P 72; Berthelsen Aff. PP 18-19.) The court therefore rejects any contention that class counsel's interest in recovering attorneys' fees has prevented them from adequately representing the class. Cf. Enterprise Energy Corp. v. Columbia Gas Transmission Corp., 137 F.R.D. 240, 250-51 (S.D.Ohio 1991) (approving attorneys' fees of $5,000,000 where class recovery totalled $56,600,000, and noting that "percentages awarded in common fund cases typically range

from 20 to 50 percent of the common fund created").

2.16 Several objectors argue that the class members' interests are adverse because the class is comprised of players in different stages of their careers, contending that there are conflicts between rookies and veterans, and between veterans with different levels of seniority. This, however, is not the type of adversity which precludes class certification. No matter what stage a player is in his career, defendants have imposed various rules "in substantially identical manner to all players within the NFL." Alexander, 1977-2 Trade Cas. (CCH) P 61,730, at 72,989, 1977 WL 1497, at * 8. Moreover, players obviously do not remain at the same level of seniority; as their careers progress, they will all be subject to the same series of rules. Thus, all veteran players were at one time rookies subject to the same college draft, and all veteran players have been subject to either the Plan B right of first refusal/compensation rules, or one of its predecessors. Thus, on numerous occasions, courts have certified settlement classes consisting of all players in a particular sports league. Id. at 72,989-92, 1977 WL 1497, at *8-10; Robertson, 389 F.Supp. at 896-903; Powell, 711 F.Supp. at 966-69.

2.17 Moreover, no matter what level of seniority, all class members share a common interest in the form and substance of the NFL's player rules, and all class members share a similar interest in the future of the NFL. Cf. Robertson, 389 F.Supp. at 899 (even former players were concerned about the National Basketball Association's

future). Although the free agency rules set forth in the proposed settlement vary depending on players' seniority, that distinction does not create adverse interests within the class because those rules relate solely to the remedy, not to the subject matter, of the present litigation. See Alexander, 1977-2 Trade Cas. (CCH) P 61,730, at 72,990, 1977 WL 1497, at *9 (citing Sperry Rand Corp. v. Larson, 554 F.2d 868, 874 (8th Cir.1977)). The court further determines that variations in settlement payments based on various factors, such as the length of time a player was restricted under Plan B, do not preclude class treatment. Id. (approving class settlement where similar point system resulted in differing class settlement amounts); Robertson, 389 F.Supp. at 898 n. 57.

2.18 Various objectors contend that the interests of absent class members have been "sacrificed" in order to secure special benefits for the named plaintiffs. Although the propriety of rewarding named plaintiffs has been "rigorously debated", 2 Herbert Newberg and Alda Conte, Newberg on Class Actions s 11.38, at 11-80 (3d ed. 1992), such "preferential treatment ... must be viewed in the context of [the] litigation." In re Jackson Lockdown/MCO Cases, 107 F.R.D. 703, 709 (E.D.Mich.1985). The court must examine the settlement "closely to ensure that the named plaintiffs have fairly represented the interests of the class." Luevano v. Campbell, 93 F.R.D. 68, 89 (D.D.C.1981). Courts, however, routinely approve such awards for class representatives who expend special efforts

that redound to the benefit of absent class members. See, e.g., Thornton v. East Texas Motor Freight, 497 F.2d 416, 420 (6th Cir.1974) (approving greater awards for those who took a more active role in seeking class relief); Enterprise Energy Corp., 137 F.R.D. at 250 (approving class representative "incentive awards" where named plaintiffs took steps to protect interests of class members, thereby effectuating "a Settlement that provides substantial economic and non-economic benefits to the Class Members"); In re Jackson Lockdown/MCO Cases, 107 F.R.D. at 710 (approving such award); Luevano, 93 F.R.D. at 89; Alexander, 1977-2 Trade Cas. (CCH) P 61,730, at 72,990, 72,996, 1977 WL 1497, at *9, *17 (distribution of settlement payments based on a point system was "fair and reasonable" and economic interests of named plaintiffs did not conflict with those of absent class members even where "[a]dditional points [we]re awarded to the named plaintiffs"); cf. Huguley v. General Motors Corp., 128 F.R.D. 81, 85 (E.D.Mich.1989) (in case where incentive awards were not objected to, noting that "named plaintiffs and witnesses are entitled to more consideration than class members generally because of the onerous burden of litigation they have borne"), aff'd, 925 F.2d 1464 (6th Cir.), cert. denied, --- U.S. ----, 112 S.Ct. 304, 116 L.Ed.2d 247 (1991).

Thus, the adequacy of the named plaintiffs' representation is ultimately determined by the terms of the settlement itself. See, e.g., In re Corrugated Container

Antitrust Litig., 643 F.2d 195, 212 (5th Cir.1981) ("[i]t is, ultimately, in the settlement terms that the class representatives' judgment and the adequacy of their representation is either vindicated or found wanting"). In the present case, and in the related actions funded by the NFLPA, the court finds that the named plaintiffs took substantial risks to step forward. See infra P 6.18 & note 45 (detailing defendants' history of retaliating against such players). Many of the named plaintiffs have been involved in litigation for years, and have been deposed or testified at the McNeil trial. [FN30] In light of the comprehensive settlement that has been reached, which will virtually restructure the entire league and has already created and will continue to create substantial benefits for all class members, the court concludes that the interests of the named plaintiffs are neither antagonistic nor adverse to the interests of absent class members, and that the preferential treatment of the named plaintiffs is not excessive, but fair and reasonable under such circumstances. Luevano, 93 F.R.D. at 89.

FN30. Although other named plaintiffs, such as the White and Jackson named plaintiffs, have been involved for a much shorter period of time, at the time that those players stepped forward, there was no way of knowing that a settlement would be reached so soon after their lawsuits were filed. As one witness testified at the final fairness hearing, last summer one member club stated its willingness to litigate for another ten years. White, Transcript of Final

Fairness Hearing at 173 (Apr. 16, 1993) (testimony of Randy Vataha). Absent court intervention, that statement may have proven true.

2.19 Moreover, "in the settlement context ... the adequate representation requirement is satisfied when the court determines that the settlement was negotiated at arm's length and was not collusive in favoring the class representative." 2 Herbert Newberg and Alda Conte, Newberg on Class Actions s 11.28, at 11-59 (3d ed. 1992); cf. Jones v. Amalgamated Warbasse Houses, 97 F.R.D. 355, 359 (E.D.N.Y.1982) (in the absence of evidence of collusion, a "settlement is presumed regular"). After presiding over numerous related cases and participating in the final settlement negotiations in the present action, the court finds that the settlement was clearly negotiated at arm's length and presents no danger of collusion. At least four factors support this finding: the size and complexity of the Agreement and the compromises reflected therein; the context in which it was reached, that is, after five and one-half years of frequently acrimonious litigation; the court's personal knowledge of the negotiators and the tenacity with which they struggled to protect their principals' interests; and the need for the court's involvement in the final stages of the negotiations. See Robertson, 389 F.Supp. at 899 ("[t]he four- year history of this litigation is sufficient indication that the named plaintiffs and their counsel will fairly and adequately protect the

interests of the class"); White, Transcript of Preliminary Approval Hearing at 82-84 (Feb. 26, 1993) (finding no evidence of collusion and concluding settlement was product of arm's length negotiations).

Having determined that the settlement was negotiated in good faith, the court rejects any contention that the preferential treatment of the named plaintiffs jeopardized their ability to adequately represent the class. Luevano, 93 F.R.D. at 90 (approving monetary relief for named plaintiffs in settlement in which only a portion of the class received such relief where "there was no improper collusion").

2.20 Finally, there has been overwhelming class support for the proposed settlement. After extensive notice by mail, by publication and by press coverage of the proceedings, less than two percent of the class members have objected to any phase of the settlement. Out of thousands of class members, only seventy-three active or former players, and sixteen college players, have objected to the proposed class certification and settlement, and most of those objections reflect dissatisfaction with the objectors' personal circumstances. See Alexander, 1977-2 Trade Cas. (CCH) P 61,730, at 72,990, 1977 WL 1497, at *9 (rejecting claim that named plaintiffs' interests were antagonistic based on overwhelming support by absent class members); cf. Van Horn v. Trickey, 840 F.2d 604, 606 (8th Cir.1988) ("a settlement may be approved over a significant percentage of objections from class members" (citation omitted)).

2.21 Based on the foregoing, the court concludes that: none of the objectors has introduced any evidence to establish that alleged potential conflicts within the class, or between the named plaintiffs and the absent class members, are real possibilities rather than imaginative speculation. Class action status will not be denied, nor will subclasses be required, absent such a showing. Alexander, 1977-2 Trade Cas. (CCH) P 61,730, at 72,991; 1977 WL 1497, at * 9 (citing Robertson, 389 F.Supp. at 899). The court thus finds that the named representatives adequately represent the class, and denies any request to decertify the class, to form subclasses or to appoint other named plaintiffs or additional class counsel.

G. The Need To Avoid Separate Actions

2.22 Like Alexander, the court finds that the present dispute could not be settled solely by an agreement to award class members monetary relief for alleged past liability. To be effective, any settlement must also address the NFL "structural" rules that will govern players in future years. Thus, a comprehensive agreement or order must encompass such "future rules in order to afford appropriate relief to plaintiffs and to be acceptable to the defendants." Alexander, 1977-2 Trade Cas. (CCH) P 61,730, at 72,991, 1977 WL 1497, at *10.

2.23 As the Eighth Circuit observed when affirming the Alexander settlement: [t]he need to revise or to eliminate past rules and practices of professional football, [particularly veteran player restraints], plainly encompasse[s] the

possibility that adjudications of separate actions could set incompatible standards of conduct for the National Football League. Reynolds, 584 F.2d at 283. If individual players file separate actions seeking injunctive relief against NFL player restraints, there is a substantial risk of inconsistent or varying adjudications which would result in incompatible standards of conduct for the defendants. One court could grant injunctive relief, a second might deny such relief, and a third might grant injunctive relief that materially differs from that granted by the first court. See Robertson, 389 F.Supp. at 901. As the district court observed in Robertson, such: [d]iffering results in the individual actions would impair the [professional sports league's] ability to 'pursue a uniform continuing course of conduct' where pragmatic considerations require that the defendants act in the same manner to all members of the class. Id. (quotation omitted); cf. National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85, 101, 104 S.Ct. 2948, 2960, 82 L.Ed.2d 70 (1984) (college football is "an industry in which horizontal restraints on competition are essential if the product is to be available at all"); Reynolds, 584 F.2d at 287 (noting in dicta that "[s]ome leveling and balancing rules appear necessary to keep the various [NFL] teams on a competitive basis").

The near certainty of such inconsistency is borne out by the history of litigation between players and the NFL. For example, in Mackey, the Eighth Circuit determined that the NFL's interest in maintaining competitive balance

between teams should be considered under the rule of reason for purposes of determining whether a veteran player restraint violated the Sherman Act. [FN31] Mackey, 543 F.2d at 619-20. However, in Smith v. Pro Football, Inc., the Court of Appeals for the District of Columbia rejected the competitive balance justification as a matter of law, finding that under the rule of reason, the NFL's interest in maintaining competitive balance, which the NFL argued was a procompetitive effect, could not be balanced against the anticompetitive effects of the college draft. 593 F.2d 1173, 1186 (D.C.Cir.1978); see also Brown v. Pro Football, Inc., Civ. No. 90-1071, slip op. at 19-23, 1992 WL 88039, at *9-10 (D.D.C. March 10, 1992) (applying Smith and refusing to consider competitive balance when determining whether defendants were liable for fixing the wages of developmental squad players for the 1989 NFL season).

FN31. Under rule of reason balancing, the "key issue is thus whether [the veteran player restraint] is essential to the maintenance of competitive balance, and is no more restrictive than necessary." Mackey, 543 F.2d at 621.

The near certainty of incompatible rules of conduct for defendants is further demonstrated by the current inconsistent case law concerning the scope of the nonstatutory labor exemption. In the Powell case, the Eighth Circuit determined that nonstatutory labor exemption

protects defendants as long as the "labor relationship continues", but declined to define at what point such relationship ends. 930 F.2d at 1303. A federal district court in the District of Columbia, however, rejected the Eighth Circuit's ruling in Powell, and found that the exemption ends when the parties' collective bargaining agreement expires. Brown v. Pro Football, Inc., 782 F.Supp. 125, 129-33 (D.D.C.1991); cf. Bridgeman v. National Basketball Ass'n, 675 F.Supp. 960, 964-67 (D.N.J.1987) (rejecting both expiration of collective bargaining agreement and negotiating impasse as point at which exemption terminates, and finding that the exemption continues as long as the employer "reasonably believes that the challenged practice or a close variant of it will be incorporated in the next collective bargaining agreement").

Based on the foregoing, the court concludes that class certification is appropriate under Rule 23(b)(1)(A). See Reynolds, 584 F.2d at 283 (finding that certification of a 23(b)(1) class is appropriate in cases involving antitrust challenges to a system of player restraints because "[a]ntitrust violations involving the rules and practices governing professional players may require the imposition of broadly based remedies").

The court further concludes that the prosecution of separate actions by individual players would create the risk of judgments that may, as a practical matter, affect the rights of class members and impair their ability to protect their interests. As the court observed in Alexander: such

risks are illustrated by the attempt of one objector to initiate a separate suit challenging the agreed-to structural rules and seeking injunctive relief in another forum. 1977-2 Trade Cas. (CCH) P 61,730, at 72,991, 1977 WL 1497, at *11. The numerous lawsuits already filed by various class members seeking injunctive relief clearly demonstrate that such risks are also present in the instant case. See, e.g., Hurst v. National Football League, Civ. No. 92-3263 (E.D.La. filed Oct. 1, 1992); Sanders v. National Football League, No. 92-4365 (C.D.Cal. filed July 23, 1992). Accordingly, the court determines that certification is also appropriate under Rule 23(b)(1)(B). Powell, 711 F.Supp. at 969; Alexander, 1977-2 Trade Cas. (CCH) P 61,730, at 72,991, 1977 WL 1497, at *11; Robertson, 389 F.Supp. at 901.

2.24 Although the present class would also satisfy the requirements for certification under Rule 23(b)(3), the court determines that the class should be certified exclusively under Rule 23(b)(1). As numerous courts have held, when there is a choice between (b)(1) and (b)(3) certification, it is proper to proceed under (b)(1) exclusively in order to further the policies underlying (b)(1) class actions, that is, to avoid inconsistent adjudications or the compromise of class interests which otherwise would occur as a result of class members' ability to opt out under a (b)(3) class. See, e.g., Reynolds, 584 F.2d at 284; Robertson, 556 F.2d at 685; Green v. Occidental Petroleum Corp., 541 F.2d 1335, 1340 (9th Cir.1976);

Specialty Cabinets & Fixtures v. American Equitable Life Ins. Co., 140 F.R.D. 474, 477 (S.D.Ga.1991); Powell, 711 F.Supp. at 969; Alexander, 1977-2 Trade Cas. (CCH) P 61,730, at 72,991-92, 1977 WL 1497, at *11. In such cases, certification of a mandatory class is preferred because: [i]n Rule 23(b)(3) opt-out classes ... absent class members are connected with one another [solely] because their claims involve common questions. By contrast, no opt-out classes satisfying Rule 23(b)(1) or (2) were designed specifically to avoid the risks of inconsistency, prejudice, or inequity that would result to persons similarly situated in the absence of a unitary adjudication of their common claims.... [Thus] the protection of the rights of class members in [no opt-out] classes ... is much more interdependent with resolution of the rights of others similarly situated than is the case for [23(b)(3)] class members.... 1 Herbert Newberg & Alda Conte, Newberg on Class Actions s 1.20, at 1-48 (3d ed. 1992).

In the present action, the claims of class members are not connected solely because they involve common questions, but rather because they arise from a system of player rules that have been uniformly imposed on all professional football players. See Alexander, 1977-2 Trade Cas. (CCH) P 61,730, at 72,989, 1977 WL 1497, at *8 (defendants have imposed various rules "in substantially identical manner to all players within the NFL"). [FN32] The court therefore finds that class certification under Rule 23(b)(1) is more appropriate than under Rule 23(b)(3)

because it effectuates the policies underlying such mandatory class actions.

FN32. As a result of this identity of interest, in McNeil, the court determined that all eight plaintiffs, if injured, suffered from the same antitrust injury, that is, the inability to compete in the relevant market for professional football players' services. See McNeil, Civ. No. 4-90- 476, 1992 WL 315292, at *1 (D.Minn. Sept. 10, 1992) (Question 4 of the special verdict form, which required the jury to determine plaintiffs' economic injury collectively rather than individually); id. at *5 (Jury Instruction No. 29, setting forth antitrust injury alleged by plaintiffs).

2.25 For the foregoing reasons, the court concludes that a definable class exists that satisfies the requirements of, and should be finally certified pursuant to, Federal Rule of Civil Procedure 23(b)(1).

III. DUE PROCESS DOES NOT REQUIRE THAT ABSENT CLASS MEMBERS BE GIVEN OPT-OUT RIGHTS

3.1 Opt-out rights are not required in actions involving classes properly certified pursuant to Rule 23(b)(1). See Fed.R.Civ.P. 23(b)(1), (c)(2).

3.2 A number of objectors have argued that, under the Supreme Court's decision in Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985) and its progeny, minimum due process requires that

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 9105 Sunset Boulevard, West Hollywood, California 90069; that on April 18, 1995, I served the within *Appendix For Petition For Writ of Certiorari (Volume III of IV)* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on April 18, 1995, Los Angeles, California.

Betty J. Malloy
(*Original Signed*)

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
APRIL TERM, 1995

SEAN JONES, *et al.*,

Petitioners,

v.

REGGIE WHITE, *et al.*,

Respondents;

NATIONAL FOOTBALL LEAGUE, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

APPENDIX FOR PETITION FOR WRIT OF CERTIORARI
VOLUME IV OF IV

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TABLE OF CONTENTS

Byron Evans, et al. v. National Football League, et al.
(Nos. 93-/3375/3381/3382/3403/3415MNMI)
United States Court of Appeals for the Eighth Circuit (January 20, 1995) Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc 1

Reggie White, et al. v. National Football League, et al.
(Nos. 93-3375, 93-3381, 93-3382, 93-3403, 93-3415)
United States Court of Appeals for the Eighth Circuit (December 6, 1994) Opinion of the Court 2

Reggie White, et al. v. National Football League, et al.
Civ. No. 4-92-906, United States District Court for the District of Minnesota (August 20, 1993) Order 18

Reggie White, et al. v. National Football League, et al.
Civ. No. 4-92-906, United States District Court for the District of Minnesota (August 20, 1993) Final Consent Judgment 26

Reggie White, et al. v. National Football League, et al.
Civ. No. 4-92-906, United States District Court for the District of Minnesota (August 19, 1993) Order 34

Reggie White, et al. v. National Football League, et al. Civ. No. 4-92-906, United States District Court for the District of Minnesota (April 30, 1993) Order 170

absent class members be afforded an opportunity to opt out of all class actions that involve claims for money damages. The court finds, however, that there is little support for such a broad interpretation of Shutts.

(a) The Supreme Court's decision in Shutts does not purport to make every mandatory non-opt-out class action unconstitutional. In Shutts, the Supreme Court determined that where a class action concerns claims "wholly or predominantly for money judgments", absent class members must be given notice, an opportunity to oppose the class settlement and an opportunity to opt out. 472 U.S. at 811-12 & n. 3, 105 S.Ct. at 2974-75 & n. 3. The Supreme Court, however, did not address class actions in which the claims for injunctive relief plainly predominate, and specifically stated that its holding was: limited to those class actions which seek to bind known plaintiffs concerning claims wholly or predominantly for money judgments. We intimate no view concerning other types of class actions.... Id. at 811 n. 3, 105 S.Ct. at 2974 n. 3; see also In re Jackson Lockdown/MCO Cases, 107 F.R.D. at 713-14; 7B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure s 1789, at 255 (2d ed. 1986) (noting Supreme Court's explicit limitation); 1 Herbert Newberg & Alda Conte, Newberg on Class Actions s 1.19, at 1-48 (3d ed. 1992) (Shutts was silent concerning the validity of classes certified under Rule 23(b)(1) and "[i]t is highly unlikely that the Supreme Court would have invalidated [that] rule[ ] without expressly doing so").

(b) The court thus concludes that even where a class action involves claims for money damages, mandatory non-opt-out class certification remains proper as long as the class claims for equitable or injunctive relief predominate over the claims for damages. In re Jackson Lockdown/MCO Cases, 107 F.R.D. at 713-14; (distinguishing Shutts for purposes of certifying class action involving claims for monetary relief under Rule 23(b)(1)); cf. Probe v. State Teachers' Retirement Sys., 780 F.2d 776, 780 (9th Cir.) (analyzing whether money damages are incidental to primary claim for injunctive relief for purposes of determining whether certification was proper under Rule 23(b)(2)), cert. denied, 476 U.S. 1170, 106 S.Ct. 2891, 90 L.Ed.2d 978 (1986); Williams v. Lane, 129 F.R.D. 636, 639-43 (N.D.Ill.1990) (same); Lloyd v. City of Philadelphia, 121 F.R.D. 246, 251 (E.D.Pa.1988) (class certified under Rule 23(b)(1)(B) and (b)(2)). [FN33]

FN33. The latter three cases all address the question of whether classes were properly certified under Rule 23(b)(2), which permits class actions involving both injunctive and monetary damages only in situations where the money damages are "merely incidental to the[ ] primary claim for injunctive relief." Probe, 780 F.2d at 780; see 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure s 1775, at 463 (2d ed. 1986) ("a suit predominantly seeking money damages would not qualify under this portion of the rule"). As previously discussed, in Shutts, the Supreme Court adopted virtually

the same test for purposes of determining whether absent class members have a constitutional right to opt out of a mandatory class, that is, whether a class is "wholly or predominantly for money judgments". 472 U.S. at 811 n. 3, 105 S.Ct. at 2974 n. 3. In addition, the purposes underlying (b)(1) and (b)(2) class actions are the same: "to avoid the risks of inconsistency, prejudice, or inequity that would result to persons similarly situated in the absence of a unitary adjudication of their common claims". 1 Herbert Newberg & Alda Conte, Newberg on Class Actions s 1.20, at 1-48 (3d ed. 1992). The court thus concludes that the cited Rule 23(b)(2) cases are instructive for purposes of determining whether a class action is properly considered as one "predominantly for money judgments." The court further rejects any claim that Rule 23(b)(2) cases are inapposite because such class actions are confined to civil rights claims. See, e.g., id. s 4.12, at 4-40 ("[t]he Advisory Committee Notes to Rule 23 emphasize that subdivision (b)(2) is not limited to civil rights cases", and the Note explicitly cites "price discrimination by wholesalers against a class of retailers and tying violations by patentees as examples in which Rule 23(b)(2) class actions could be used in antitrust cases").

(c) The court further rejects the contention of various objectors that mandatory non-opt-out class actions that include claims for money damages are confined solely to "limited fund" cases. Mandatory non-opt- out classes under

Rule 23(b)(1) may also be certified in cases involving claims for money damages in which no "limited fund" exists. See, e.g., Boggs v. Divested Atomic Corp., 141 F.R.D. 58, 67 (S.D.Ohio 1991); Specialty Cabinets & Fixtures, 140 F.R.D. at 477 (although the most common use, "limited fund cases are not the only cases certified under this subsection"). Similarly, courts routinely certify mandatory non-opt-out classes under Rule 23(b)(2) in cases involving hybrid claims for injunctive relief and damages, even in the absence of a "limited fund." Probe, 780 F.2d at 780; Lloyd, 121 F.R.D. at 251.

3.3 The factual circumstances of this case, and its predecessors, confirm that it is a case in which the plaintiff class's claims for structural, injunctive relief "predominate" over its claims for damages. In reaching this conclusion, the court relies on the following:

(a) The repeated motions for preliminary and permanent injunctive relief filed by the plaintiffs in Powell, McNeil, Jackson, and White. Indeed, the original complaint in the present action sought only injunctive relief.

Moreover, as previously discussed, class members' claims are interrelated because players are subject to a uniform system of player rules; therefore there is a significant identity of interest between class members for purposes of analyzing their economic injuries. See supra note 32. To provide a meaningful class remedy, any injuries must be redressed primarily through broad injunctive relief. In the absence of such relief, any award

of monetary damages would merely be a stopgap measure, insufficient to prevent the reoccurrence of such injuries while likely generating an unending procession of lawsuits.

(b) The entire record of the McNeil trial, and in particular, the testimony of the eight player-plaintiffs. For example, Freeman McNeil, the lead plaintiff in the McNeil case, testified at trial that his primary purpose in filing the McNeil lawsuit was not to recover money damages, but rather "[w]hat I'm suing for is the right to be able to make a choice in my life with what I do." McNeil Trial Transcript at 922. [FN34]

FN34. The court also noted McNeil's testimony during the final fairness hearing. White, Transcript of Final Fairness Hearing at 46 (Apr. 16, 1993).

(c) The repeated representations of class counsel and other player representatives, both before and after the parties had reached a tentative agreement to settle, that these lawsuits primarily sought either the elimination or the substantial modification of various NFL rules regarding player movement and employment. For instance, at the preliminary approval hearing, class counsel stated "that the essence of what the players have been seeking through all of this litigation has been a change in the overall system, a change in the industry-wide rules that have affected the terms and conditions of their employment." White, Transcript of Preliminary Approval Hearing at 19 (Feb. 26,

1993).

(d) The statements made by defendants and their representatives to the same effect. See Declaration of Paul Tagliabue PP 18, 27 (dated Feb. 22, 1993).

(e) The terms of the Stipulation and Settlement Agreement itself, which devotes 179 pages of the 188-page document to redefining the rules and practices governing player employment in the NFL.

3.4 In cases where sufficient alternative procedural safeguards are employed, opt-out rights are not constitutionally required. See, e.g., Williams v. Burlington Northern, Inc., 832 F.2d 100, 104 (7th Cir.1987) (even though plaintiff did not have right to opt out, court "provided [plaintiff] with the equivalent due process protection that would be accorded to a Rule (23)(b)(3) class member"), cert. denied, 485 U.S. 991, 108 S.Ct. 1298, 99 L.Ed.2d 508 (1988); cf. Robertson, 556 F.2d at 685-86 (discussing due process rights of mandatory class members prior to Shutts). Moreover: [b]ecause the protection of the rights of class members in classes certified under Rule 23(b)(1) or (2) is much more interdependent with resolution of the rights of others similarly situated than is the case for [23(b)(3)] class members connected only because their claims involve common questions, it is probable that individual procedural due process rights involving minimum contacts with the forum will not be imposed on these more cohesive, interdependent class actions, when they were not required in more discretionary common question class

actions. 1 Herbert Newberg & Alda Conte, Newberg on Class Actions s 1.20, at 1-48 (3d ed. 1992) (discussing impact of Shutts). Even though class members in the present case may not opt out, the court concludes that the requirements of due process have been satisfied because the objectors have been: (1) adequately represented by the named plaintiffs; (2) adequately represented by capable and experienced class counsel; (3) provided with adequate notice of the proposed settlement; (4) given an opportunity to object to the settlement; and (5) assured that the settlement will not be approved unless the court, after analyzing the facts and law of the case and considering all objections to the proposed settlement, determines it to be fair, reasonable and adequate. See, e.g., Williams, 832 F.2d at 104; Nottingham Partners v. Dana, 564 A.2d 1089, 1100-01 (Del.1989).

3.5 The court determines that the Ninth Circuit's recent decision in Brown v. Ticor Title Ins. Co., 982 F.2d 386 (9th Cir.1992), is not to the contrary. The Brown case does not alter the constitutional standards articulated in Shutts and, in fact, expressly recognizes that "Shutts is limited to claims 'wholly or predominantly for money judgments.' " Id. at 392 (quoting Shutts, 472 U.S. at 811 n. 3, 105 S.Ct. at 2974 n. 3). At most, Brown stands for the proposition that where a class action involves claims "wholly or predominantly" for money damages, and where the settlement of such class action accords only injunctive relief and no damage recovery, an absent nonresident class

member's later claim for damages will not be barred.

The court concludes that Brown has no application to the present case because: (1) the plaintiff class' claims are predominantly injunctive in nature, and (2) the relief provided for by the terms of the settlement, although predominantly injunctive, also includes substantial payments to settle the damages claims of the individual players.

3.6 Accordingly, the court concludes that due process does not require that absent class members be afforded an opportunity to opt out of the White class settlement.

IV. SUMMARY OF THE TERMS OF THE PROPOSED SETTLEMENT

A. Structural Relief

4.1 Free Agency. The following is a brief summary of the principal provisions of the Stipulation and Settlement Agreement relating to veteran free agency.

(a) The settlement provides that, except for the few "Franchise" and "Transition" players to whom special rules apply, all players with at least five years of NFL experience whose contracts have expired may negotiate and enter into contracts with NFL teams as unrestricted free agents during a "signing period" extending from contract expiration, on or about March 1st, through approximately July 15th, of each year. In the event that the contingent salary cap provision, discussed infra PP 4.3-.5, is in effect, the Agreement provides for free agency after four rather than five years of experience.

(b) Players with three or four years of experience whose contracts have expired may be subject to certain rights of first refusal ("RFR") by their existing team-employer, and if the player moves to a new team, his new employer may have to give draft rights as compensation to the player's former team; however, such rights cannot be invoked unless the former team has tendered the player a substantial contract offer. The scope of such rights also varies depending on the amount of the offer: in general, the higher the offer, the greater the rights acquired. Moreover, in the event that NFL revenues increase from one year to the next, the amounts of those requisite tender offers are to increase at the same rate, up to a maximum of ten percent per year.

(c) Players with less than three years of experience are subject to their former teams' exclusive negotiating rights, provided that they are offered salaries of at least $100,000 for players with less than one year of experience, $125,000 for players with one year of experience and $150,000 for players with two years of experience. In the event that NFL revenues increase from one year to the next, those minimums are to increase at the same rate, up to a maximum of ten percent per year.

(d) All veteran players are governed by the above free agency rules except those who are designated "Franchise" or "Transition" players. In any year, each team is permitted to designate one Franchise Player by tendering an offer of a one year contract at a salary

amounting to the greater of (1) the average of the salaries of the five highest paid players at the designated player's same position, or (2) a twenty percent increase in the designated player's previous year's salary. A team thereby obtains exclusive negotiating rights to the Franchise Player, notwithstanding his years of experience.

(e) In the first year of the Agreement, each team may designate two, and, in both the second and final year of the Settlement Agreement, one, Transition Player(s) by tendering an offer of a one year contract at a salary amounting to the greater of (1) the average of the salaries of the ten highest paid players at the designated player's same position, or (2) a twenty percent increase in the designated player's previous year's salary. A team thereby obtains a RFR with respect to the transition player, notwithstanding his years of experience.

(f) In years when there is no salary cap in effect, the four teams in the previous season's conference championship games are not permitted to sign unrestricted free agents from other teams. The next four runner-up teams in the playoffs can sign one unrestricted free agent from another team at a salary of $1.5 million or more per year, and an unlimited number at less than $1 million. In the event of an increase in NFL revenues, those amounts are to increase at the same rate. Notwithstanding the above, those eight teams can replace their own free agents who have moved to other teams, and pay any such replacement player up to the amount the departed free agent is receiving

from his new team.

4.2 College Draft. Under the terms of the Stipulation and Settlement Agreement, the NFL college player draft consisted of eight rounds this year, and will be seven rounds thereafter, substantially fewer than the prior twelve round draft. In addition to the seven rounds of the draft, there may also be up to twenty-eight "compensatory" draft picks per year for teams losing certain free agents. Teams obtain exclusive negotiating rights to their rookie draftees through a tender at the minimum active-list salary (initially $100,000). All players who were eligible to be drafted, but were not chosen, are free to negotiate with any team of their choosing.

4.3 Salary Cap. If in any season the league-wide total of player costs rises to sixty-seven percent of Defined Gross Revenues ("DGR"), as that term is defined in the Stipulation and Settlement Agreement, the salary cap provisions are triggered, and the cap will go into effect in the following season. If in effect, the salary cap will limit the percentage of DGR that can be expended on player costs as follows: in the first "capped" year, total league-wide player costs may not exceed sixty-four percent of DGR; in the second year sixty-three percent; in the third year sixty-two percent; and in subsequent years sixty- two percent; subject to certain cap adjustment and removal provisions. The cap is to be equally allocated among the teams. Once triggered, the total dollar amount of the cap cannot go down from one year to the next, subject to a

maximum cap of seventy percent of DGR. There is to be no salary cap in 1999, the final year of the Agreement.

4.4 League and Team Guarantees. Minimum salary guarantees will come into effect simultaneously with the triggering of the salary cap. Such guarantees will require that league-wide player costs amount to at least fifty- eight percent of DGR and that each team's player costs amount to at least fifty percent of its own share of DGR. Any shortfall on those guarantees will be paid out immediately at the end of each season to affected players on a league- wide or per-team basis, as appropriate.

4.5 Salary Cap "Lift Off". If, after the cap is triggered, league-wide player costs drop below fifty-nine percent of DGR, the next year's cap is increased by one percent; if below fifty-eight percent, the cap is increased by two percent; if below fifty-seven percent, the cap is increased by three percent; and if below fifty-six percent, the cap is lifted entirely, subject again to the sixty-seven percent trigger.

4.6 Entering Player Pool. Under the terms of the Stipulation and Settlement Agreement, the salaries of rookie players are not to exceed the higher of: (1) 3.5% of DGR, (ii) $2 million times the number of teams in the league, or (iii) the previous year's pool. That amount, which cannot decrease from year to year, currently equals approximately the average, over the past three years, of the amount that has been expended on salaries of all draftees in the first eight rounds. The amount available to each team for rookie

draftees will vary depending on several factors, including order in the draft, traded draft picks and compensatory picks. Incoming drafted rookies will negotiate their salaries individually within the pool. The salaries of undrafted rookies do not come out of the pool except to the extent that they exceed the minimum active-list salary applicable to such players.

4.7 Anti-Collusion Provisions. The Stipulation and Settlement Agreement also contains various anti-collusion provisions which prohibit the NFL and any NFL member team from agreeing with any other team regarding: (1) the decision to negotiate or not negotiate with any player; (2) the decision to submit or not submit an offer sheet to any restricted free agent; (3) the decision to offer or not offer a contract to any player; (4) the decision to exercise or not exercise a right of first refusal; or (5) the terms or conditions of employment offered to any individual player for inclusion in a player contract. In addition, an expedited and comprehensive enforcement mechanism has been created to deter and punish any collusion violations.

4.8 Court Supervision. The court will retain jurisdiction over the enforcement of the Settlement Agreement through appointment of a special master, who will hear disputes on an expedited basis, subject to review by the court.

B. Monetary Relief

4.9 The Stipulation and Settlement Agreement also provides monetary relief to the plaintiff class. Specifically,

the defendants are to pay approximately $115 million for distribution to class members in the White case. In addition, as set forth below, another $80 million in monetary relief and reimbursement of costs will be paid to players and the NFLPA by the NFL defendants in settlement of this and other related litigation. Of the $195 million total amount to be paid by the NFL, approximately $97 million will be paid this year and the remaining $98 million will be paid in five annual installments through 1998.

4.10 The $115 million White settlement fund is to be allocated pursuant to the following plan:

(a) Class members with claims for damages resulting from Plan B and accompanying player restraints will be assigned points in accordance with the formula set forth below. The value of a point will be determined by dividing the sum of $110 million by the total number of points assigned. Points will be assigned as follows: --Players who entered new contracts after being protected under Plan B in 1990, 1991, or 1992 will receive 1 point for each year in which they continue to be restricted while playing under such a contract. --Players who renegotiated and/or extended contracts prior to being protected under Plan B in 1990, 1991, or 1992 will receive 1/2 point for each year in which they continue to be restricted while playing under such a contract. --Players who entered new contracts after being protected under Plan B in 1989 will receive 1/2 point for each year in which they continue to be restricted while playing under such contract. --Players who renegotiated

and/or extended contracts prior to being protected under Plan B in 1989 will receive 1/4 point for each year in which they continue to be restricted while playing under such a contract.

(b) The named plaintiffs in the White case will not receive any points for contracts entered into while protected in 1990, 1991, and/or 1992, but will instead receive the following amounts: Reggie White--$0; Michael Buck--$134,805; Vann McElroy--$470,194; Hardy Nickerson--$494,836. Those amounts represent the damages, before trebling, that they would have sought at trial were they to use the methodology for estimating damages developed and relied upon by Michael Glassman, the plaintiffs' expert economist in the McNeil case, as adjusted to apply to the facts of each player. In addition, Reggie White will receive 1 1/2 points because he entered into a three-year contract extension in 1990 before being protected in that year, and Hardy Nickerson will receive 1 point because he entered into a two-year contract extension in 1990 before being protected in that year.

(c) The named plaintiffs in the Lewis case, which has been consolidated with White, will not receive any points for contracts entered into in 1989, but will instead receive the following amounts for their damage claims arising in that year: Albert Lewis--$711,600; Wayne Radloff--$214,115. Those amounts represent the damages, before trebling, that they would have sought at trial were they to use the Glassman methodology.

(d) Individual plaintiffs in the related player lawsuits that are being settled concurrently with the class action are not to receive any points for claims in those cases that are coextensive with any claims that they may have in the White class action.

(e) Class members with claims for deprivation of preseason pay will be assigned points in accordance with the following formula. The value of a preseason pay point will be determined by dividing the sum of $5 million by the total number of points assigned. Class members will receive one tenth of one preseason pay point for each hundred dollars, or fraction thereof, of their claims. The amount of each player's "claim" is equal to the amount he was entitled to earn under Paragraph 6 of his NFL Player Contract minus whatever amount he was actually paid by his team prior to being cut in the preseason period.

(f) As in White, Lewis, and the individual player cases, the named plaintiff for the preseason pay claims, Dave Duerson, will not receive any preseason pay points but will instead receive the sum of $98,302, which is the amount of damages, before trebling, that he would have sought at trial were he to use the Glassman methodology.

C. Settlement of Related Litigation

4.11 The class action settlement described above is one part of a broader global settlement of a host of other litigation between players and defendants. The class action settlement could not have been reached without the concurrent resolution of those other matters, because it is

the objective of both the class and of the NFL to lay a firm foundation for peace for years to come. Beyond this overarching benefit, the global settlement provides a number of additional significant benefits to class members as described below.

4.12 Back Pay. The back pay case, NFLPA v. NFL Management Council, was filed shortly after the end of the 1987 strike on behalf of all striking players and alleges that the NFL had wrongfully deprived all returning strikers of one week's pay by preventing them from returning to work for one week despite the fact that the players were ready, willing and able to do so. That case is to be settled in consideration of payment by the NFL defendants to the striking players, all of whom are White class members, of approximately $30 million.

4.13 Licensing Litigation. NFLPA v. NFL Properties, Inc., No. 90-CV-4244 (S.D.N.Y.), was filed on June 25, 1990, by the NFLPA, seeking damages for antitrust violations and tortious interference with existing NFLPA group licensing authorizations. That lawsuit is to be settled in consideration of the NFL defendants' agreement (i) to pay the plaintiff NFLPA $10 million; (ii) to sublicense certain of the contested players' rights back to the plaintiff NFLPA; and (iii) to assign to the NFLPA certain licensing agreements with manufacturers that had licensed players' rights from NFL Properties. The $10 million fund will be distributed by the NFLPA to all NFLPA members who signed and honored their group

licensing authorizations. The beneficiaries of that settlement are also White class members. In addition, as a direct result of the global settlement, seven other licensing related cases between and among the NFLPA, NFL Properties, various individual players, and various NFLPA and NFL Properties' licensees will be settled. [FN35]

FN35. Those cases are: NFLPA v. Roby, Case No. 92-09092(15) (Cir. Ct. Broward Cty. Fla.); NFLPA v. Carrier, Case No. 92 CH 3281 (Cir. Ct. Cook Cty. Ill.); NFLPA v. Fulcher, Case No. 92-CI-00604 (Kenton Cir. Ct. Ky.); NFLPA v. Clayborn, Docket No. 92-00984 (Norfolk Sup.Ct. Mass.); NFLPA v. Golic, Docket No. C123-92 (Sup.Ct. Bergen Cty. N.J.); NFL Properties, Inc. v. Hi Pro Marketing, No. 92 Civ. 1456 (S.D.N.Y.); and Aikman v. AAA Sports, No. 92 Civ. 1457 (S.D.N.Y.).

4.14 Preexisting Individual Lawsuits. There are a number of individual player lawsuits, all funded by the NFLPA, which predate the filing of the White class action and challenge the Plan B rules and various other alleged unlawful practices by the NFL relating to the terms and conditions of player employment. [FN36] Those cases are to be settled separately, and the plaintiffs therein will not participate in the class settlement fund to the extent that their claims in such cases are coextensive with claims that they might have made in the White class action. For example, the eight McNeil plaintiffs will not receive any

points for 1990 or 1991, the years for which they sought damages in their individual complaint, but will receive points, if eligible, for 1989 and 1992 as class members. The total consideration to be paid by the NFL defendants for the settlement of those preexisting cases is approximately $19,028,628.

FN36. Those cases are: McNeil v. National Football League, Civ. No. 4- 90-476 (D.Minn.); Jackson v. National Football League, 802 F.Supp. 226 (D.Minn.); Joyner v. National Football League, Civ. No. 92-2876 (E.D.Pa.); Allen v. Chargers Football Co., Civ. No. 91-4322 (C.D.Cal.); Hebert v. National Football League, Civ. S023456 (Sup.Ct.Cal.); Solomon v. National Football League, No. 92-1244 (Tex. Dist.Ct.); Morris v. New York Giants, Inc., (Arbitration before Hon. Bernard S. Meyer); Chandler v. Indianapolis Colts, Inc., Civ. No. 54601-9009-CP-0453 (Ind.Cir.Ct.); Mullin v. Los Angeles Rams Football Co., No. B063729 (Cal.Ct.App.); and Tice v. Pro Football, Inc., Civ. No. 4-93-169 (D.Minn.).

D. Attorneys' Fees, Costs, and Disbursements

4.15 No legal costs are to be paid out of the settlement fund. However, as part of the global settlement, defendants have agreed to reimburse the NFLPA for attorneys' fees, costs, and disbursements, in the amount of approximately $18,847,520, incurred in connection with its financing, prosecution, and defense of the White class action

and the other lawsuits that are concurrently being settled.

V. STANDARD FOR COURT EVALUATION OF THE STIPULATION AND SETTLEMENT AGREEMENT

5.1 The policy in federal court favoring the voluntary resolution of litigation through settlement is particularly strong in the class action context. Armstrong v. Board of Sch. Directors, 616 F.2d 305, 312-13 (7th Cir.1980); Holden v. Burlington Northern, Inc., 665 F.Supp. 1398, 1405 (D.Minn.1987). Settlement of the complex disputes often involved in class actions minimizes the substantial burdens to the parties and to scarce judicial resources that such litigation entails. Armstrong, 616 F.2d at 313.

5.2 Notwithstanding the strong policy favoring settlement, Federal Rule of Civil Procedure 23(e) provides that a class action may not be dismissed or compromised without court approval. Under this rule, the court has a duty to protect the rights of absent class members as well as the interests of the named plaintiffs. Grunin, 513 F.2d at 123; Welsch v. Gardebring, 667 F.Supp. 1284, 1289 (D.Minn.1987).

5.3 In evaluating a class action settlement pursuant to Rule 23(e), the district court's primary responsibility is to ensure that the settlement is "fair, reasonable, and adequate." Van Horn v. Trickey, 840 F.2d 604, 606 (8th Cir.1988) (citing Grunin, 513 F.2d at 123); In re Flight Transp. Corp. Sec. Litig., 730 F.2d 1128, 1135 (8th Cir.1984), cert. denied, 469 U.S. 1207, 105 S.Ct. 1169, 84

L.Ed.2d 320 (1985).

5.4 Such a determination is committed to the discretion of the trial judge, and will not be overturned except on a showing that the district court clearly abused its discretion. Wiener v. Roth, 791 F.2d 661, 662 (8th Cir.1986); Reynolds, 584 F.2d at 283; Grunin, 513 F.2d at 123. Great weight is accorded the trial court's views: 'because he is exposed to the litigants, and their strategies, positions and proofs. He is aware of the expense and possible legal bars to success. Simply stated, he is on the firing line and can evaluate the action accordingly.' Reynolds, 584 F.2d at 283 (quoting Grunin, 513 F.2d at 123 (quotation omitted)).

5.5 In evaluating the fairness, reasonableness and adequacy of the proposed settlement, the court is to consider various factors, the most important of which is the strength of plaintiffs' case on the merits balanced against the benefits to the class provided by the settlement. Van Horn, 840 F.2d at 607; Grunin, 513 F.2d at 124; Holden, 665 F.Supp. at 1407. Other important factors include: 1) the opinions of the participants, including class counsel, class representatives, and class members; 2) the complexity, expense, and likely duration of further litigation; 3) the extent of discovery completed and the stage of the proceedings; and 4) the evidence, if any, that the proposed settlement is the product of fraud and collusion. Holden, 665 F.Supp. at 1407 (citations omitted); accord Armstrong, 616 F.2d at 314; Grunin, 513 F.2d at 124; Welsch, 667

F.Supp. at 1290.

5.6 Moreover, in evaluating the settlement; the court does not have the responsibility of trying the case or ruling on the merits of the matters resolved by agreement. Alexander, 1977-2 Trade Cas. (CCH) P 61,730, at 72,993, 1977 WL 1497, at * 12. Rather, " 'the very purpose of compromise is to avoid the delay and expense of such a trial.' " Id. (quoting Grunin, 513 F.2d at 124). The court's ultimate responsibility is to determine whether the settlement as a whole " 'is so unfair as to preclude judicial approval.' " Id. (quoting Robertson v. National Basketball Ass'n, 72 F.R.D. 64, 68 (S.D.N.Y.1976), aff'd, 556 F.2d 682 (2d Cir.1977)).

5.7 Finally, where, as here, the settlement of class claims includes a lump sum payment, the court must also approve of a plan for allocating the settlement proceeds to class members. See Alexander, 1977-2 Trade Cas. (CCH) P 61,730, at 72,996; 1977 WL 1497, at *17; 3 Herbert Newberg & Alda Conte, Newberg on Class Actions s 12.35, at 12-76 (3d ed. 1992).

VI. THE PROPOSED SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE

A. The Strengths of Plaintiffs' Case Balanced Against the Benefits of the Settlement

6.1 In weighing the strength of plaintiffs' case against the benefits provided by the proposed settlement, the court: cannot be expected to balance the scales with the nicety of an apothecary. The very object of compromise 'is

to avoid the determination of sharply contested and dubious issues.' Alexander, 1977-2 Trade Cas. (CCH) P 61,730, at 72,993, 1977 WL 1497, at * 12 (quoting Young v. Katz, 447 F.2d 431, 433 (5th Cir.1971)). Thus, the court's determination generally will not go beyond "an amalgam of delicate balancing, gross approximation, and rough justice." Welsch, 667 F.Supp. at 1290 (quoting City of Detroit v. Grinnell Corp., 495 F.2d 448, 468 (2d Cir.1974)).

6.2 The Risks of Further Litigation. Plaintiffs face numerous risks and uncertainties in going forward with this litigation. Those risks include the following:

(a) Despite the verdict in the McNeil case, the establishment of defendants' liability for the imposition of the right of first refusal/compensation rules of Plan B is still subject to appeal. Defendants have indicated their intent to appeal the McNeil judgment on a number of grounds, including the applicability of the nonstatutory labor exemption, defendants' alleged incapacity as a "single entity" to enter into an antitrust conspiracy, the proper application of the rule of reason under Section 1 of the Sherman Act, and the "fact of injury" element of liability in a private antitrust action. Should the McNeil judgment be overturned on one or more of those grounds, plaintiffs would at best be faced with the prospect of retrying, at great expense and after substantial delay, the issue of liability. At worst, if defendants were to prevail on issues such as the labor exemption or the single entity defense, plaintiffs might be entirely precluded from establishing liability.

In addition, because the McNeil verdict involved only the right of first refusal/compensation rules of Plan B, plaintiffs would still have to prove defendants' liability concerning the other challenged restraints, most significantly the college draft and the league's preseason pay policies, with the latter claims burdened by pending counterclaims for substantial sums.

(b) Even if such liability were established, the results of the McNeil trial demonstrate that the class members would face substantial obstacles and uncertainties in proving damages. Evaluating the same type of damage issues presented here, the McNeil jury awarded no damages to four of the eight plaintiffs, while the four other plaintiffs received far less than they had sought, despite plaintiffs proffering substantial evidence in support of their damage claims. [FN37] Cf. Kapp v. National Football League, 586 F.2d 644, 648 (9th Cir.1978) (player asserting multimillion dollar claim failed to prove that challenged restraint caused any damages). Finally, after presiding over the McNeil trial, the court notes that one cannot discount the reluctance of a jury to award damages to professional football players, who are readily perceived as successful, highly paid individuals. See Alexander, 1977-2 Trade Cas. P 61,730, at 72,995, 1977 WL 1497, at *16 (damages uncertain because there was "no assurances that class members' claims would be sympathetically viewed by the jury"); Robertson, 72 F.R.D. at 69 (it would be difficult to convince a jury that professional basketball players should

be paid more money).

FN37. The following is a comparison of the damages that plaintiffs' expert, Michael Glassman, calculated for the McNeil plaintiffs versus the actual damages awarded by the jury:

		Estimated Damages	
Plaintiff	Actual Damages *	Plan B Model	USFL Yardstick
Mark Collins	$178,000	$ 396,000	$ 387,000
Don Majkowski	0	1,366,000	1,338,000
Tim McDonald	0	681,000	668,000
Freeman McNeil	0	399,000	383,000
Frank Minnifield	50,000	425,000	410,000
Niko Noga	0	190,000	184,000
Dave Richards	240,000	480,000	473,000
Lee Rouson	75,000	100,000	97,000
TOTAL	$543,000	$4,037,000	$3,940,000

* Before trebling.

The court notes that plaintiffs' actual experience in McNeil undermines
the expert opinion concerning damages proffered by various objectors.

(c) Even if it were conclusively established that all of the player rules challenged in the present class action violate the antitrust laws, there is uncertainty as to the scope of injunctive relief that would be afforded to the plaintiffs. If the present case is not settled, plaintiffs will likely face further litigation concerning the "reasonableness" of some other modified player reservation system adopted by defendants. [FN38]

FN38. In McNeil and Jackson, defendants made perfectly clear their intent to impose Plan C, Plan D and so on, until one passed muster.

6.3 The Benefits to the Class. The terms of the Stipulation and Settlement provide for substantial benefits to the class. Those benefits include the following:

(a) A radically modified player reservation system that provides for substantial unrestricted free agency for veteran players, a result that is consistent with the primary goal of players in this and predecessor lawsuits. The terms of the settlement ensure that almost every player with at least five years of experience (four, if a salary cap is in place) will, on contract expiration, have the opportunity to

offer his services to other teams. See supra P 4.1(a) (detailing provisions).

(b) Higher "tender" requirements before a club can place any restrictions on a player's mobility. For instance, in order to invoke the narrow exceptions for Franchise and Transition players, clubs must tender very substantial offers to the players, so as to make those players among the highest paid in professional football. See supra P 4.1(d) (setting forth tender required for Franchise Players); P 4.1(e) (detailing tender required for Transition Players). Similarly, with respect to those players with as little as three years of experience, clubs can limit their rights to become unrestricted free agents only if their former teams tender substantial offers. See supra P 4.1(b) (discussing rules for such players).

(c) Lesser restrictions on those players who are subject to free agency limitations. Under Plan B, most restricted players were subject to both a right of first refusal and compensation of two first round draft picks. However, the Settlement Agreement provides that the restrictions on such players will vary from a minimum of a right of first refusal alone to a maximum of a right of first refusal plus compensation of one first round and one third round draft pick; greater restrictions will require substantially higher tender offers.

(d) A fewer number of rookie players will be subject to the college draft, which is to consist of seven rounds (eight in 1993) as compared to the prior draft, which

consisted of twelve rounds. All other college players will be unrestricted free agents. See supra P 4.2 (detailing college draft provisions).

(e) Substantial league-wide and team minimum "guarantees" in the form of a percentage of revenues that is to be paid to players in the event a salary cap were to go into effect. See supra P 4.4 (describing various guarantees).

(f) Strict anti-collusion provisions with an expedited and comprehensive enforcement mechanism to deter and punish any collusion by defendants. See supra P 4.7 (discussing anti-collusion provisions).

(g) Settlement payments totalling $115 million to be distributed among White class members. A rough gauge of the magnitude of the settlement fund may be provided by comparing it to the recovery of the class in the Alexander case, which also sought a league-wide recovery for injuries to players accruing over several years as a result of a similar NFL system of veteran player restraints. In Alexander, 3,292 players participated in a fund of $13,675,000, and players' average share was approximately $4,100. 1977-2 Trade Cas. P 61,730, at 72,996-97, 1977 WL 1497, at *18-19. [FN39] In the present case, the bulk of the fund is to be distributed among approximately 1100 class members with Plan B damage claims, and the average share for those class members is approximately $100,000, which is twenty-five times greater than the average recovery in Alexander.

FN39. As previously noted, the Alexander settlement employed a point system similar to the one used here.

Another rough indication of the adequacy of the settlement is to compare the amount that each player will receive for a year of damages in 1990, 1991 or 1992, that is, the value of one point in the distribution formula, with the recovery actually obtained by the eight plaintiffs in the McNeil case. It is estimated that the settlement will provide each class member with approximately $70,000 for every year in which he was subject to the Plan B rules between 1990 and 1992, as compared to an average recovery per year of damages by the McNeil plaintiffs of $36,200. [FN40] Many class members will receive more than one point, with the maximum recovery of 3 1/2 points for players who were restricted in all four years, resulting in a payment of approximately $245,000.

FN40. That figure results from dividing the total damages, before trebling, found by the jury in McNeil, $543,000, see supra note 37, by fifteen years, the total number of years for which plaintiffs sought damages.

6.4 Since the court entered its preliminary approval order on February 26, 1993, the substantial benefits to class members provided by the Stipulation and Settlement Agreement have already become apparent. In just a little over a month, seventy-eight unrestricted free agents have

entered into new contracts, fifty-three of them with new teams. (Quinn Supp.Aff. P 9.) Additionally, at least ten restricted free agents, who are subject to first refusal and compensation rights, have received offers from other teams. (Quinn Supp.Aff. P 11.) Of those, four players have already moved to new teams and two others may still do so. Players designated as Transition Players have also been receiving offers. To date, at least four Transition Players have received offers from other teams, and one has contracted with a new club and changed teams. (Quinn Supp.Aff. P 15.) Those players have also received substantial salary increases. Id. The court thus concludes that the marketplace experience during the first month of the new free agency system strongly confirms the substantial benefits that the Settlement Agreement bestows on the class.

B. Complexity, Expense and Likely Duration

6.5 Continued litigation of the present action would be complex, expensive and protracted. First, various liability issues may be affected, or even precluded, by an appeal of the McNeil case. As previously discussed, defendants would likely appeal the McNeil verdict and would seek to stay the present case while their appeal is pending. See supra P 6.2(a) (noting grounds on which defendants are likely to appeal). An appeal in the McNeil case would likely be protracted, presenting novel and complex legal issues. See supra P 2.23 (discussing conflicting case law concerning various issues presented by these cases).

6.6 Apart from the liability issues relating to Plan B, there are also additional liability issues that would have to be tried, including the legality of the college draft and the issue of preseason pay. Some indication of the time and resources needed to prepare and resolve a trial on the draft may be obtained by looking at the McNeil case, in which years of preparation and months of trial were required to adjudicate the legality of the Plan B restraints on veteran players.

6.7 Issues concerning injunctive relief are also complex. Whether granted as a permanent injunction in the McNeil case, a preliminary injunction in the present action, or both, any court-ordered relief against the current NFL player reservation system would likely provoke further litigation and appeals.

6.8 Beyond liability and injunctive relief lie damage issues that could be even more complex. The courts that approved the settlements of the analogous Alexander and Robertson cases both noted that proof of damages in cases such as this can be extremely time-consuming and costly. Alexander, 1977-2 Trade Cas. (CCH) P 61,730, at 72,995, 1977 WL 1497, at *15 (trial of damages issues would be "lengthy, costly and almost overwhelming"); Robertson, 72 F.R.D. at 70. Plaintiffs' experience in McNeil underscores the problems in proving such damages. See supra P 6.2(b) & note 37.

C. Class Counsel and Class Members Believe that the Settlement is Reasonable

6.9 As detailed in the declarations of James W. Quinn and Edward M. Glennon, submitted in support of final court approval of the settlement, plaintiffs' counsel strongly believe that the proposed settlement is reasonable, fair and in the best interest of the class. As representatives of the plaintiffs in the Powell and McNeil cases, class counsel have been intimately involved in the entire five-year history of related lawsuits which culminated in the present settlement. The court therefore affords considerable weight to the opinion of experienced and competent counsel that is based on their informed understanding of the legal and factual issues involved. See Armstrong, 616 F.2d at 325 ("[w]hile the court ... should not abdicate its responsibility to review a class action settlement merely because counsel support it, the court is entitled to rely heavily on the opinion of competent counsel"); Welsch, 667 F.Supp. at 1295 (the court is to give "great weight to ... the judgment of experienced counsel").

6.10 It is also significant that class counsel consulted with the NFLPA in negotiating the settlement. Since the expiration of the last collective bargaining agreement in August 1987, the NFLPA has supported numerous player lawsuits challenging the legality of various NFL player restraints, and it has entirely funded the present class action, its predecessors Powell and McNeil, and various other related lawsuits that are being settled simultaneously with this case. Based on their consultation with the NFLPA and with the class representatives, class counsel believe that the

reaction of the overwhelming majority of the players to the settlement has been extremely favorable. (Quinn Aff. P 79.)

6.11 The overall favorable response of the plaintiffs and class members to the proposed settlement strongly supports settlement of this action. After extensive notice by mail and publication, more than ninety-eight percent of the class have supported the proposed settlement; only eighty-nine class members have filed objections to the proposed settlement out of a class comprised of more than five thousand class members.

D. The Extent of Discovery Completed and the State of the Proceedings

6.12 The extent of discovery completed and the stage of the proceedings at which settlement is reached are important factors because they are indicative of both the court and counsel's ability to evaluate the merits of plaintiffs' claims. Armstrong, 616 F.2d at 325; Welsch, 667 F.Supp. at 1297. Although the present case is technically in its early stages, the evaluation of the merits of plaintiffs' claims is necessarily informed by the comprehensive records compiled in the prior player lawsuits involving similar or identical issues. Just as the Alexander court was able to evaluate the propriety of the proposed class action in light of its experience in the Mackey case, here the McNeil case, which after years of discovery and a three-month trial has been litigated through verdict, provides a sound basis on which to evaluate the strengths and

weaknesses of plaintiffs' case and the merits of the proposed settlement.

E. The Settlement is the Product of Arm's Length Negotiations

6.13 The proposed settlement is the culmination of over five years of hard fought litigation in which NFL players, represented by class counsel, challenged the legality of the NFL player reservation system. Cf. Robertson, 389 F.Supp. at 899 ("[t]he four-year history of this litigation is sufficient indication that the named plaintiffs and their counsel will fairly and adequately protect the interests of the class"). As previously discussed, during the course of the litigation, the court presided over various related cases and participated in the final stages of the settlement negotiations. As a result of its involvement, the court is aware that the settlement was not reached easily, but represents the product of long and difficult negotiations, conducted in good faith and at arm's length by experienced and able attorneys. (See also Quinn Aff. PP 21-30; Tagliabue Decl. PP 31-33.) In addition, the court relies on the following factors to support its conclusion that the settlement was negotiated at arm's length: the size and complexity of the Agreement and the compromises reflected therein; the context in which it was reached, that is, after five and one-half years of frequently acrimonious litigation; the court's personal knowledge of the negotiators and the tenacity with which they struggled to protect their principals' interests; and the need for the court's involvement in the final stages of the negotiations.

See also White, Transcript of Preliminary Approval Hearing at 82-84 (Feb. 26, 1993) (finding no evidence of collusion and concluding settlement was product of arm's length negotiations).

The court also relies on its determination that the terms of the proposed settlement are fair, reasonable and adequate. See infra Section VI(F). Under such circumstances, the court may assume that the negotiations were proper. See, e.g., Bowling v. Pfizer, Inc., 143 F.R.D. 141, 152 (S.D.Ohio 1992) (citation omitted).

F. The Method of Distributing the Settlement Funds is Fair and Reasonable

6.14 The plan for distributing the settlement proceeds was devised by class counsel, in consultation with the NFLPA, in an effort to ascertain the relative amount of damages suffered by class members, while also taking into account the relative strengths of the various claims.

6.15 The basic structure of the formula for allocating the fund for Plan B claimants, which equally apportions the fund among players with claims of like nature in the same time period, is modeled on the allocation formula approved by the court in the Alexander settlement. [FN41] Players who entered into new contracts after being restricted in 1990, 1991 or 1992, receive one point for each year of such a contract based on the rationale that the Plan B rules had an overall depressing effect on salaries by depriving all such players, after their contracts expired, of the ability to bargain as free agents in a competitive market. Players who

renegotiated or extended their contracts before being restricted in 1990, 1991 or 1992, receive only one-half point for each year of such a contract because the recovery of damages is less certain in those circumstances than for players who were protected after contract expiration. (Quinn Aff. P 60.) While players arguably suffered no damages if already under contract when they were restricted, it could also be argued that any contract renegotiation would have been conducted with the parties' knowledge that the player was going to be restricted, and therefore, the resulting contract would not reflect what the player would have been able to obtain in a competitive market.

FN41. A similar formula was used in Robertson to settle analogous antitrust claims of a class of professional basketball players. (Quinn Aff. P 59.)

6.16 The above point values are reduced by a factor of one-half for damage claims arising out of contracts entered into in 1989 because plaintiffs with those claims, which exist only by virtue of the Lewis case, would have less chance of establishing liability than players with claims arising in the later years. The NFL defendants have argued that any claims for damages in 1989 are precluded by the Eighth Circuit's ruling on the labor exemption in the Powell case. 930 F.2d at 1301-03. The issue of whether this court's dismissal of 1989 damage claims in Powell is

binding on the entire Powell class, which is comprised of essentially all NFL players, [FN42] or just the named plaintiffs is currently pending before the Eighth Circuit on defendants' appeal of this court's decertification and dismissal of the Powell case. Powell v. National Football League, 773 F.Supp. 1250 (D.Minn.1991); see Quinn Aff. P 61. No points are attributed to contracts entered into before 1989, because any pre-Plan B claims would appear to be precluded by the Eighth Circuit's ruling in Powell, 930 F.2d at 1301-03.

FN42. In addition to various subclasses, the Powell class seeking relief from veteran player rules consists of: all veteran players who were on the active roster of a [member] club at the beginning of the 1987 NFL football season, and all veteran players who are at any time on the active roster of, or under contract to, an NFL club prior to the date of a final judgment in this action. Powell v. National Football League, 773 F.Supp. 1250, 1252 (D.Minn.1991) (citing prior orders in Powell). Moreover, if the Eighth Circuit were to rule that this court improperly dismissed various class claims, see id., or that the labor exemption still applies, an issue which is arguably pending in Powell, but see Powell v. National Football League, 139 F.R.D. 381, 383 (D.Minn.1991) (rejecting that claim), such rulings could preclude all players' claims, including damage claims, based on veteran player restraints.

6.17 No points are to be given for new contracts that were signed while players were unrestricted under Plan B, because such unrestricted players were able to obtain substantial benefits thereby, and their damages, if any, would be much smaller and more difficult to ascertain than those of restricted players. No points are to be awarded for damage claims based on the college draft, because it is unlikely that players would be able to establish liability for any draft claims arising prior to 1993. The expiration date of the draft provision in the last collective bargaining agreement extended beyond the rest of the agreement, through 1992, and thus, as a result of the Eighth Circuit's decision in Powell, the labor exemption would likely bar damage claims based on the draft until 1993. (Quinn Aff. P 62.) [FN43]

FN43. The Brown court has held that the labor exemption continues until a collective bargaining agreement expires. Brown v. Pro Football, Inc., 782 F.Supp. 125, 130-33 (D.D.C.1991).

6.18 Instead of receiving points for the claims in their respective cases, the named plaintiffs in White and Lewis are to receive payments amounting to the actual damages that they would have sought if they were to rely on the methodology developed by plaintiffs' expert economist in the McNeil case. [FN44] (Quinn Aff. PP 54, 55.) That procedure will result in larger recoveries for the named

plaintiffs than for other class members, but as previously discussed, the court determines that such preferential treatment of the named plaintiffs is fair and reasonable in the context of the present litigation. See supra P 2.18; Enterprise Energy Corp., 137 F.R.D. at 250 (approving class representative "incentive awards" where named plaintiffs took steps to protect interests of class members, thereby effectuating "a Settlement that provides substantial economic and non-economic benefits to the Class Members"); Luevano, 93 F.R.D. at 89. Most of the named plaintiffs stepped forward and actually participated in the litigation as witnesses or in discovery. Several of the named plaintiffs also believed that participating as a plaintiff might pose a risk to their careers, a fear that is underscored by defendants' history of retaliating against players who filed such suits. (Berthelsen Aff. PP 21-24.) [FN45] Moreover, the named plaintiffs helped to obtain enormous benefits inuring to all class members, therefore the court concludes that it is appropriate that they be permitted additional consideration. Alexander, 1977-2 Trade Cas. (CCH) P 61,730, at 72,996; 1977 WL 1497, at *17 (distribution of settlement payments based on a point system was "fair and reasonable" even where "[a]dditional points [we]re awarded to the named plaintiffs").

FN44. Similarly, to the extent that their claims in the preexisting lawsuits are coextensive with any claims that they might have had in the White class action, the named

plaintiffs in the preexisting lawsuits are not to share in the class settlement fund. (Quinn Aff. P 56.) The procedure of separately settling the preexisting individual cases that laid the groundwork for the present class action is similar to that followed in Alexander, in which the preexisting and related Mackey case was settled for separate consideration. Alexander 1977-2 Trade Cas. (CCH) P 61,730, at 72,992, 1977 WL 1497, at *19 (discussing separate settlement funds set up for Mackey and Alexander).

FN45. The Berthelsen affidavit sets forth specific examples of such retaliation. For example, Kermit Alexander was cut by the Philadelphia Eagles after striking in 1974. The Eagles were subsequently forced to reinstate Mr. Alexander pursuant to an NLRB decision. After becoming the named plaintiff in the class action challenging the Rozelle Rule, Mr. Alexander was again cut by the Eagles. (Berthelsen Aff. P 23(a)). John Mackey was traded, and as a result, his career was prematurely terminated, in retaliation for his role in the Mackey case. See id. P 23(b). The NLRB also affirmed an Administrative Law Judge's finding that Sam McCullum was cut by the Seattle Seahawks in retaliation for confronting management on strike issues. See id. P 23(c). Irvin Eatman's situation also demonstrates the pressure that such named plaintiffs face. Mr. Eatman was originally a named plaintiff in McNeil. At that trial, his agent, Thomas Condon, testified that when he was negotiating Mr. Eatman's contract with the Kansas City

Chiefs, he was informed that the Chiefs would not sign, release or trade Mr. Eatman as long as he remained a named plaintiff in McNeil. Mr. Eatman subsequently withdrew as a named plaintiff. See id. P 23(c).

6.19 The named plaintiffs in the present action, as well as the named plaintiffs in the related player challenges to Plan B that are being simultaneously settled, also receive another benefit. Those players will have the right to refuse designation as either Franchise or Transition Players for the remainder of their NFL careers. [FN46] (Quinn Aff. P 71.) As previously discussed, in light of the enormous non-monetary benefits to the class achieved by the settlement, as well as the magnitude of the total settlement fund, the court concludes that the additional payments and benefits to the named plaintiffs are not disproportionate to the risks and efforts they have undertaken. The court further notes that the interests of the five named plaintiffs in the present case are not antagonistic to those of the absent class members because the differences in treatment "relate solely to the remedy and not to the subject matter of the litigation." Alexander, 1977-2 Trade Cas. (CCH) P 61,730, at 72,990, 1977 WL 1497, at *9 (citation omitted); see supra P 2.18.

FN46. That provision will likely benefit no more than twenty-five of the plaintiffs named in the various cases, because the remaining named plaintiffs have either retired

from professional football, or have not been designated as either Franchise or Transitional Players.

6.20 The apportionment of the settlement fund between the Plan B and preseason pay claims was made by class counsel, in consultation with the NFLPA, in an effort to estimate the relative aggregate value of the different types of claims while taking into account the strength of such claims on the merits. (Quinn Aff. P 64.) Based on the methodology employed by Michael Glassman, plaintiffs' expert economist in the McNeil case, plaintiffs in the present action would have sought approximately $530 million in class-wide damages for their Plan B claims. The Plan B settlement fund of $110 million is approximately twenty-one percent of that total. The total class-wide damages sought by plaintiffs for preseason pay claims amounts to approximately $22 million, and the preseason pay settlement fund of $5 million is approximately twenty-three percent of that total. In addition, the entire $5 million fund for preseason claims is to be paid out in the first year of the Agreement. (Quinn Aff. P 64.)

6.21 Both types of claims are subject to substantial uncertainties concerning proof at trial. As previously discussed, the experience of the McNeil plaintiffs demonstrates the difficulty of proving damages arising from defendants' player rules. See supra P 6.2(b) & note 37. Moreover, liability has not yet been established for the preseason pay claims, thus there is the additional risk that

players with such claims will never have the opportunity to prove damages.

In addition to the uncertainties involved in the proof of plaintiffs' affirmative case for the preseason pay claims, defendants have asserted tens of millions of dollars in counterclaims and offsets that could reduce or eliminate any recovery on those claims.

6.22 The formula for distribution of the preseason pay claim fund seeks to equitably apportion the fund among the claimants by comparing each player's share to the amount of his claim without considering the impact of any offsets or counterclaims. The formula is more closely tied to a player's actual "claim" for damages than the Plan B formula because, unlike the inherently uncertain Plan B claims, the amount of a preseason pay claim may be computed by reference to three factors: (i) the player's base salary under Paragraph 5 of his NFL Player Contract; (ii) the number of weeks that the player played before being cut in the preseason period; and (iii) the amount that the player was actually paid. (Quinn Aff. P 65.) As with the Plan B claims, the named plaintiff for the preseason pay claims, Mr. Duerson, is to receive the damages that he would have sought at trial and will not share in the preseason pay settlement fund. (Quinn Aff. P 63.) [FN47]

FN47. Similarly, the named plaintiffs in the preexisting Tice lawsuit, who are also separately settling their individual claims, will not share in the preseason pay

settlement fund but will receive the damages that they would have sought at trial.

6.23 Based on the foregoing, the court concludes that the method of distributing the settlement funds is fair and reasonable.

VII. THE CLAIMS OF THE OBJECTORS DO NOT WARRANT DISAPPROVAL OF THE SETTLEMENT

7.1 As of April 2, 1993, timely objections to the settlement were filed on behalf of fifty-eight active or former NFL players. [FN48] In addition, timely objections were filed on behalf of one NFL member club, the Philadelphia Eagles, one college player, Brian Pressler, and one player agent, Robert J. Sheridan. [FN49]

FN48. See supra note 11 (listing those objectors).

FN49. Mr. Sheridan purportedly filed objections on behalf of Brian Pressler, and all other present and future "college and other football players" similarly situated. He also purportedly filed objections on behalf of himself and all present and future agents and attorney-agents similarly situated.

The court also considered all other, untimely objections that had been filed as of the date of the final fairness hearing, April 16, 1993. [FN50] There were fifteen

such objections filed on behalf of active or former NFL players, [FN51] and fifteen objections filed on behalf of college players. [FN52]

FN50. As previously noted, at the hearing, the court granted all motions to extend time, ruling that all objections filed as of the hearing date, April 16, 1993, would be considered by the court, whether such objections were timely filed or not. However, the court also ruled that April 16, 1993, was the deadline for objections, and that it would not consider any objections filed after that date.

FN51. Those objectors were: Brian Blades, Roland James, Pat Carter, Kenneth F. Ruettgers, Jerry Ball, Jeff Bostic, Todd Bowles, Ray Brown, Jason Buck, Earnest A. Byner, Desmond Howard, Anthony Johnson, Brian Mitchell, Ricky Sanders and Paul Siever.

FN52. Untimely objections were filed on behalf of college players Jesse Becton, Scott Brown, Rudy Thompson, Ernie Lewis, Eugene Brown, Percy Coleman, James Chinn, Ron Alexander, Brad LaCombe, Dan Purcell, Steve Ross, Ron Moran, Steve Robinson, Garrett Washington and Bennie Hargro.

A. Player and Agent Objections

7.2 As a preliminary matter, the court notes that if the "vast preponderance of the class members" do not object

to the settlement, then claims of inadequacy by some class members are entitled to little weight. See City of Detroit v. Grinnell Corp., 495 F.2d 448, 462 (2d Cir.1974); cf. Van Horn, 840 F.2d at 606 ("class settlement may be approved over significant percentage of objections from class members"). In any given year, approximately 1,500 players are employed in the NFL during the course of the regular season. Hundreds of additional players are employed by the NFL clubs each year during the preseason. Class counsel estimates that the White class consists of more than 5,000 active and former NFL players, as well as numerous players who are likely to be drafted. The number of class members objecting to the proposed settlement is less than two percent of the total class. The court concludes that the vast preponderance of the class supports the terms of the proposed settlement.

7.3 Other than the Philadelphia Eagles, the overwhelming majority of objectors oppose the settlement because: (i) one or more elements of the proposed player reservation system allegedly violate the antitrust laws, or (ii) one or more provisions of the settlement are allegedly unfair as applied to that player or group of players. The court will address each group of objections in turn. [FN53]

FN53. Because many of the player-objectors moved to join with others' objections at the final fairness hearing, the court did not address most of the objections individually. Objections to the adequacy of notice and the certification of

the White class are discussed supra. See Sections I-III.

7.4 A number of objectors contend that the court must withhold its approval because various provisions of the Settlement Agreement violate the antitrust laws.

7.5 In reviewing a proposed class action settlement, the Eighth Circuit has determined that the trial court does not have the privilege or duty of independently resolving the issues of fact and law "which underlie the merits of the dispute." Grunin, 513 F.2d at 123 (quoting City of Detroit, 495 F.2d at 456). " 'The very purpose of compromise is to avoid the delay and expense of such a trial.' " Id. at 124 (quotation omitted).

7.6 When evaluating the propriety of an antitrust class action settlement, the Grunin court further held that: unless the terms of the agreement are per se violations of antitrust law, we must apply a 'reasonableness under the totality of the circumstances' standard to the court's approval. Id. at 124 (quotation omitted).

7.7 Similarly, when affirming approval of a class action settlement involving professional basketball players in Robertson, the Second Circuit applied the standard set forth in Grunin and held that such a settlement agreement is entitled to approval unless the terms of the agreement are per se illegal, are illegal to a "legal certainty" or the settlement authorized future conduct that is clearly illegal. Robertson, 556 F.2d at 686 (citing Grunin, 513 F.2d at 124).

7.8 In McNeil, this court determined that right of first refusal/compensation rules of Plan B should be evaluated under the rule of reason, rather than the per se rule. McNeil, 790 F.Supp. at 896-97. In making that determination, the court observed that all of the cases to date had "applied the rule of reason rather than the per se analysis" to determine whether various NFL player restricts violated the antitrust laws. Id. [FN54] The court concludes that at the present time, absent a full trial on the merits, it is unlikely that the proposed settlement, taken as a whole, would be deemed a per se violation of the antitrust laws because the Agreement would probably be subject to analysis under the rule of reason. [FN55] See Robertson, 556 F.2d at 686 (court may not disapprove of settlement if "challenged practices have not been held to be per se illegal in any previously decided case"); Grunin, 513 F.2d at 124. Moreover, a player reservation system that was more restrictive than the instant settlement was expressly approved in Alexander. Accordingly, the court overrules any objections that the settlement as a whole fails because it is per se illegal. Id.

FN54. See, e.g., Mackey, 543 F.2d at 606, 619 ("the unique nature of the business of professional football renders it inappropriate to mechanically apply per se illegality rules"); Smith v. Pro Football, Inc., 593 F.2d 1173, 1182 (D.C.Cir.1978) ("the legality of player restrictions in professional sports should be governed by the

rule of reason"); Kapp v. NFL, 390 F.Supp. 73, 82 (N.D.Cal.1974) ("in this particular field of sports league activities the purposes of the antitrust laws can be just as well served (if not better served) by the basic antitrust reasonableness test as by the absolute per se test sometimes applied by the courts in other fields"), aff'd in part and dismissed in part on other grounds, 586 F.2d 644 (9th Cir.1978), cert. denied, 441 U.S. 907, 99 S.Ct. 1996, 60 L.Ed.2d 375 (1979).

FN55. In McNeil, plaintiffs argued that there was "sufficient judicial experience" concerning the illegality of various player restraints "to warrant the application of the per se rule" to the challenged Plan B rules. 790 F.Supp. at 896. The court, however, rejected that contention, concluding that it was "bound by the Mackey decision, in which the Eighth Circuit determined that the Rozelle Rule should be judged under the rule of reason", not the per se rule. Id. at 897. Nevertheless, if there is future litigation concerning the legality of any NFL player rules, plaintiffs' argument may be adopted by some court. This court, however, makes no ruling on the issue.

7.9 Various objectors ask the court to disapprove of the entire settlement as a result of one or two provisions. Alternatively, they ask the court to strike or revise those objectionable provisions before approving the settlement.

7.10 If, however, the court concludes that the

Settlement Agreement as a whole is fair, reasonable and adequate to the class, its inquiry is ended and it should approve the entire settlement. This court has previously determined that: in acting to protect the interests of the class when reviewing a settlement, the court cannot rewrite or modify the terms of the agreement.... The settlement must be approved or disapproved as a whole. Welsch, 667 F.Supp. at 1289-90 (citations omitted). Another judge in this district has similarly ruled that: [a]lthough the court must act to protect the interests of the class when reviewing the proposed settlement, the court also recognizes that it is limited in its ability to change that agreement. The proposed settlement must stand or fall as a whole.... The court is not to dictate or rewrite the terms of the proposed agreement. Holden, 665 F.Supp. at 1406 (citations omitted).

Thus, even if it were sympathetic to objections directed at one or more provisions of the Settlement Agreement, the court may not pick and choose which provisions to approve and which to disapprove.

7.11 Moreover, after carefully considering all of the objections that call into question a specific provision or provisions of the Settlement Agreement, the court nonetheless concludes that the Agreement as a whole is fair, reasonable and adequate to the class. Accordingly, the court will not deny final approval on the basis of those objections.

7.12 Taken as a whole, the revised player employment rules set forth in the Settlement Agreement

constitute a new and unique approach to player employment in the NFL. Class counsel and the NFLPA believe that the entire Agreement will benefit the overwhelming majority of the players in the NFL, and raise salaries throughout the league. Defendants believe that the provisions challenged by various objectors, including the college draft, the rules concerning modified free agency, the Franchise and Transition Player provisions, the Final Eight Plan and the salary cap, are essential for the maintenance of competitive balance, quality of play and franchise stability. [FN56]

FN56. Defendants further claim that challenged provisions are consistent with the jury's verdict in McNeil, and Eighth Circuit law, under which defendants contend that they are entitled to impose some type of player reservation system. It is unclear, however, whether those assertions are supported by either the McNeil verdict or Eighth Circuit law, and the court does not rule on defendants' claims.

7.13 Examining the Franchise Player provisions of the Settlement Agreement, the court specifically finds that: (i) a club invoking the Franchise Player provisions must make an extraordinarily high salary tender to any player so designated; [FN57] (ii) such required tenders act merely as a floor and not a ceiling on the designated player's salary; [FN58] and (iii) the Franchise Player provisions are extremely limited in scope. [FN59] The court further notes that any tenders for Franchise Players next year will clearly

reflect the market increase in player compensation this year for other players in the same position. (Quinn Supp.Aff. P 13); see supra P 4.1(d) (setting forth required tender). Moreover, Franchise Players may use contracts entered into by other players in the same position this year as a benchmark for their own negotiations, thereby benefitting from market increases in the current year. [FN60] Thus, despite their designation, Franchise Players will still receive substantial benefit from the increased competition for player services. [FN61]

FN57. Of the twenty-eight member clubs, only ten have designated Franchise Players, likely reflecting the magnitude of the tender required to make such designation. (Quinn Supplemental Aff. P 12.) The court thus rejects the contention that the minimum tender provides no benefit, because it protects class members to the extent that it deters teams from making such designations. Moreover, as discussed above, it does provide individual Franchise Players with a floor under which their teams may not bargain. Although ten players have been designated as Franchise Players, two of those ten are named plaintiffs, and have refused such designation. The court notes that objections have been filed on behalf of the remaining eight players designated as Franchise Players.

FN58. As class counsel noted in his affidavit, one of the objectors: James "Jumbo" Elliott, an offensive tackle

who was designated by the New York Giants as their Franchise Player, received a minimum tender of $1,167,500, which is 91% more than his previous year's salary of $612,000. (Quinn Supp.Aff. P 13.) The affidavit further states that another Franchise Player and objector, Steve Young, is expected: to negotiate a new contract paying him $4 to $5 million per year, even though the required tender at his position (quarterback) is $3,264,000. Id. P 14.

FN59. A team may designate only one Franchise Player per year. Moreover, the required tender offer for Franchise Players is only for a one year contract. In order to restrict the same player for another year, the team must make another tender.

FN60. The court therefore rejects the contention that Franchise Players will always be one year behind other players for purposes of participating in market-wide salary increases.

FN61. The court also rejects the contention that the Franchise Player rules are more restrictive than the Plan B rules because it was theoretically possible to change teams under Plan B if a new team was willing to pay the required compensation to a player's former team. Although such movement was theoretically possible, the evidence in McNeil demonstrated that, in reality, the Plan B

compensation requirement was such an effective deterrent that during the four years in which Plan B was imposed, only three restricted players received offers from other teams, and no restricted player ever switched teams.

Based on the foregoing, the court concludes that objections concerning the Franchise Player provisions provide no basis on which to reject the proposed settlement.

7.14 The challenged Transition Player provisions similarly require substantial tenders that must be made to any player so designated. [FN62] In addition, any player designated as a Transition Player next year will derive substantial benefit from the increased competition for player services because his tender will reflect this year's increase in salaries for players in the same position. See supra P 4.1(e) (discussing required tender). Moreover, Transition Players are subject only to a right of first refusal, there is no corresponding draft pick compensation. [FN63] The evidence before the court indicates that the Transition Player provisions have not prevented some players from receiving offers from other clubs. [FN64] Those provisions are also extremely limited in application. Based on the foregoing, the court concludes that the objections to the Transition Player provisions do not present a basis for disapproving the entire settlement.

FN62. The tenders, like those for Franchise Players, operate as a floor. For example: Pierce Holt, a defensive

lineman formerly with the San Francisco Forty- Niners, has signed a three-year guaranteed contract with the Atlanta Falcons worth $7.5 million. This is far in excess of the minimum tender offer of $1,476,114 for players at his position (defensive end) and represents an increase of more than 240% over his average salary under his previous contract of $733,000. (Quinn Supp.Aff. P 15) (emphasis in original).

FN63. Thus, the Transition Player rules are less restrictive than the Plan B rules, which required such compensation.

FN64. Despite being subject to a right of first refusal, at least four Transition Players have already received offers from other teams. (Quinn Supp.Aff. P 15.; Tagliabue Decl. P 26.)

7.15 Various objectors challenge the restricted free agency provisions of the Settlement Agreement, which allow the clubs to retain certain first refusal and compensation rights to veteran players whose contracts have expired. See supra PP 4.1(b) & (c) (detailing provisions). When viewed in the context of the entire settlement, the court determines that those provisions, like the Franchise and Transition Player provisions, do not warrant disapproval of the Settlement Agreement. In making this determination, the court relies on the following facts: (i) clubs are required to

make substantial salary tenders in order for rights of first refusal or compensation to be maintained; and (ii) the draft choice compensation to a club if it fails to resign a restricted free agent is generally much less than the two first round draft choices required under Plan B. Moreover, the evidence indicates that the right of first refusal and relaxed compensation rules do not completely foreclose competitive bidding because a number of restricted free agents have received offers from other clubs, and several have already changed teams. (Quinn Supp.Aff. P 11; Tagliabue Decl. P 16.) Accordingly, the court finds that the objections to the restricted free agency provisions fail to provide a basis for rejecting the Settlement Agreement.

7.16 The court has also considered objections to the salary cap provisions, and concludes that such objections do not warrant disapproval of the settlement. The court notes that the salary cap must not be viewed in isolation, but rather, in connection with the entire agreement accepted by class counsel, including the liberalized free agency provisions and the minimum revenue guarantees that would accompany the "triggering" of the salary cap provisions.

It is also significant that all aspects of the new free agency system contained in the Settlement Agreement, including the salary cap provisions, will likely be included in a new collective bargaining agreement, under which such provisions would be exempt from antitrust law as a result of the nonstatutory labor exemption.

7.17 Objections have also been filed on behalf of

sixteen college players concerning the college draft and entering player pool. [FN65] The court finds, however, that those objections do not warrant disapproval of the Settlement Agreement. The entering player pool, which permits continued individual salary negotiations, [FN66] is part of the overall free agency system, and sets its limits based on the large amounts that rookies have earned in the last three years. The pool will also be adjusted to reflect increases in NFL revenues. The draft is reduced this year from twelve to eight rounds, and seven rounds thereafter, thus providing more college players with the right to free agency. In addition, none of the college players who filed objections were drafted, and thus have no basis on which to object to the provisions of the Settlement Agreement concerning the college draft. Accordingly, the court rejects the objections asserted on behalf of the college players.

FN65. The court notes that Mr. Sheridan widely distributed a letter in which he sought to "warn" college players of the impending settlement hearing and to solicit their objections to the settlement. His efforts, however, produced only sixteen objectors. The court concludes that the objections set forth on behalf of the college players are not widespread.

FN66. The court notes that when defendants originally imposed Plan B, it contained a provision that would have barred all individual contract negotiations as of

February 1, 1993, and established a wage scale for all players' services. McNeil, 790 F.Supp. at 875-77.

Robert Sheridan, an attorney-agent who filed objections on behalf of the college players, also objected to the draft and entering player pool on behalf of himself and all other agents similarly situated. Mr. Sheridan, however, is not a class member. Moreover, any injury he alleges is too attenuated and speculative to provide him with standing to assert a claim concerning either entering player pool or the draft, and none of the college players he claims to represent were actually drafted. The court therefore overrules the objections filed on behalf of himself, and all other agents similarly situated.

The court also rejects Mr. Sheridan's objections concerning the proposed changes in the NFL Player Contract. Mr. Sheridan argues that the modification eliminates protections provided under the existing version by making it easier for teams to cut players. Testimony at the hearing, however, indicated that under the present version of the NFL Player Contract, defendants may cut players at anytime, for any reason. White, Transcript of Final Fairness Hearing at 231-26 (Apr. 16, 1993) (testimony of Steve Jordan). Thus, the protection on which Mr. Sheridan relies does not exist under the current version of the Contract. The court finds that the proposed changes do not alter any protection previously provided. Accordingly, the court rejects any objections concerning the proposed changes

to the NFL Player Contract.

7.18 Finally, the court rejects various requests to postpone final approval of the Settlement Agreement for purposes of permitting discovery. The court first notes that class members have been provided with, or had available to them, more than adequate information with which to analyze the fairness and reasonableness of the settlement. Moreover, if there is no evidence of collusion in the negotiation process, objectors have no right to seek discovery concerning the negotiations of a class action settlement. See, e.g., In re Domestic Air Transp. Antitrust Litig., 144 F.R.D. 421, 424 (N.D.Ga.1992) (citing Mars Steel Corp. v. Continental Illinois Nat'l Bank & Trust Co., 834 F.2d 677, 684 (7th Cir.1987)). As previously discussed, the court finds that there is no evidence of any such collusion. See supra P 2.19; see also White, Transcript of Preliminary Approval Hearing at 82-84 (Feb. 26, 1993) (finding no evidence of collusion and concluding settlement was product of arm's length negotiations). The court declines to postpone approval pending discovery.

B. The Philadelphia Eagles' Objections

7.19 One NFL member club, the Philadelphia Eagles, also opposes final approval of the Settlement Agreement. The Eagles argue that court approval of the settlement should be denied because: (i) the proposed settlement of related litigation concerning players' licensing rights is unlawful; (ii) the NFLPA's role in settlement negotiations was in violation of the National Labor Relations

Act; and (iii) the Settlement Agreement improperly requires the court to issue an advisory opinion concerning the scope of the nonstatutory labor exemption.

7.20 As a threshold matter, the court determines that the Eagles lack standing to assert such objections. [FN67] A nonsettling defendant has standing to object to a settlement only if it can demonstrate some form of legal prejudice. See, e.g., Alumax Mill Prods., Inc. v. Congress Fin. Corp., 912 F.2d 996, 1001-02 (8th Cir.1990). Having found that the settlement as a whole is not per se illegal, the court concludes that the Eagles cannot demonstrate any legal prejudice.

FN67. Despite that determination, the court nevertheless considered the Eagles' written submissions, including its proposed findings, and allowed the team to set forth its objections at the final fairness hearing.

Moreover, on July 20, 1992, at a duly constituted and authorized meeting of the member clubs of the NFL, the Eagles, along with twenty-five other clubs, voted to delegate complete authority to the Executive Committee of the NFL Management Council (CEC) to propose, evaluate, negotiate and consummate a settlement agreement with class counsel. The CEC engaged in such settlement negotiations and on January 6, 1993, unanimously approved this settlement in principle, and on February 26, 1993, unanimously approved the Stipulation and Settlement

Agreement. Under the Articles of Association and Bylaws of the NFL Management Council, the Eagles are bound to abide by those actions.

In addition, the Eagles' objections violate their obligations as parties to the Stipulation and Settlement Agreement "not [to] take any action to delay or hinder ... Court approval" of the Agreement. The objections also violate the terms of this court's order of February 26, 1993, which granted preliminary approval of the Stipulation and Settlement Agreement. That order provides in relevant part that: 10. The parties are hereby preliminarily and temporarily ordered to abide by the terms of the Stipulation and Settlement Agreement until a final ruling of this Court approving or rejecting the Stipulation and Settlement Agreement. White, No. 4-92-906, slip op. at 5 (D.Minn. Feb. 26, 1993).

7.21 In any event, the court questions the plausibility of the Eagles' purported objections. The court notes that the Eagles have an ongoing disagreement with the league concerning the compensatory draft selections they have been offered for the named plaintiffs they have lost, or whom they may lose in the future. They are also demanding a compensatory draft selection for Keith Jackson, a player released from the right of first refusal/compensation rules of Plan B pursuant to this court's order of September 24, 1992. Jackson v. National Football League, 802 F.Supp. 226 (D.Minn.1992). There is evidence before the court that the Eagles' objections are nothing more than an attempt to

obtain more compensatory draft selections. (Quinn Supp.Aff. P 41.)

Turning to the specific objections, the Eagles contend that the proposed settlement of the litigation concerning players' licensing rights involving the NFLPA and NFL Properties is illegal because it provides the NFLPA with a monopoly for those rights. See supra P 4.13 & note 35 (detailing settlement terms and listing cases to be settled). However, Mr. Braman, owner of the Eagles and Chairman of the Executive Committee of NFL Properties, is reported to have spoken in favor of that settlement. (Tagliabue Decl. P 39.) In addition, sworn statements of class counsel and Commissioner Paul Tagliabue unequivocally state that the NFL has no agreement with class counsel or the NFLPA, as part of the contemplated settlement of the licensing litigation, to terminate its involvement in the player licensing business. See id. P 42. Even if that settlement is consummated, NFL Properties plans to continue in the player licensing business. Id. P 41. Moreover, if the NFLPA does seek the right to be the exclusive licensing agent of all players, that issue will likely be the subject of future collective bargaining between the NFL and the NFLPA. Based on the foregoing, the court determines that Mr. Braman's factual assertions concerning the NFL's alleged agreement with the NFLPA to "exit" the market for player licensing rights may be open to question. [FN68]

FN68. The court rejects any contention that class

counsel has a conflict because of its role in the licensing litigation. After Judge Lamberth raised the issue of a possible conflict in the Lewis case, class counsel withdrew from its representation of the NFLPA in the licensing litigation. The court therefore concludes that any alleged conflict has been cured. (Quinn Supp.Aff. PP 38-39); see also supra note 29 (finding that no such conflict exists).

7.22 The court also finds that the Eagles' challenge to the legality of the terms of the proposed settlement agreement in the licensing litigation is irrelevant to the issue of whether the proposed settlement is fair, reasonable and adequate to the class. The licensing lawsuits are related litigation principally between the NFLPA, NFL Properties, and individual NFL players. [FN69] Under Federal Rule of Civil Procedure 23, the court has no obligation to evaluate settlement agreements in any "related litigation" to which the Stipulation and Settlement Agreement merely refers.

FN69. Those lawsuits are not before this court.

7.23 The court concludes that the NFLPA's role in the settlement negotiations leading to the Stipulation and Settlement Agreement does not provide a basis on which to disapprove of the settlement. Both this court and the General Counsel of the NLRB have concluded that by sponsoring various lawsuits, the NFLPA was not thereby acting as the players' collective bargaining representative.

Powell and McNeil, 764 F.Supp. 1351 (in McNeil, rejecting without discussing defendants' claim that the NFLPA continued to function as a union because it was funding various lawsuits); see Defs.' Mem. Opp'n Pls.' Mot. Partial Summ. J. at 10 (Oct. 26, 1990) (raising that contention); Pittsburgh Steelers, Inc., No. 6-CA-23143, 1991 WL 144468 (June 26, 1991). Where it was appropriate for the NFLPA to finance the prosecution of antitrust litigation challenging terms and conditions of employment, the court finds that the NFLPA's role as consultant to class counsel in settling the same litigation is also lawful and appropriate.

7.24 Nor was the NFLPA's role in this class action an improper inducement to union formation. The court notes that labor unions increasingly use litigation as a method of organizing employees. See, e.g., Shaffer v. Farm Fresh, Inc., 966 F.2d 142 (4th Cir.), cert. denied, --- U.S. ----, 113 S.Ct. 657, 121 L.Ed.2d 583 (1992); cf. Pittsburgh Steelers, Inc., No. 6-CA- 23143, 1991 WL 144468, at *4 n. 8 (June 26, 1991) (as long as NFLPA's disclaimer of its union status was "otherwise unequivocal and adhered to", it was irrelevant that the disclaimer "was motivated by 'litigation strategy,' i.e., to deprive the NFL of a defense to players' antitrust suits"). Moreover, there is no evidence before the court to support such a claim. See infra Section X (detailing the reestablishment of the NFLPA as players' collective bargaining representative).

7.25 The Eagles also contend that any findings by

the court concerning the applicability of the labor exemption to the settlement would constitute an advisory opinion. The court concludes, however, that any findings on the applicability of the nonstatutory labor exemption to the terms of the Stipulation and Settlement Agreement would not be advisory to the extent that such terms are incorporated in any new collective bargaining agreement. A central issue in the present case, as in McNeil and Powell, is the applicability of the nonstatutory labor exemption to the NFL's player rules. As part of the compromise of those issues, class counsel has agreed that the new rules would be protected by the labor exemption for the express term of any new collective bargaining agreement in which such rules are incorporated. Accordingly, it would not be advisory for this court to find, pursuant to any joint petition by the parties to the Settlement Agreement, that the labor exemption applies to the new player employment rules to the extent they are incorporated in a new collective bargaining agreement, and for the express term thereof. Cf. Jensen v. United States, 743 F.Supp. 1091, 1103 (D.N.J.1990) (where settlement agreement provided for a judicial determination of the constitutionality of certain agency procedures, the court's decision was not advisory).

7.26 For the same reasons, the labor exemption findings contemplated by the Settlement Agreement would not constitute an improper waiver of any class member's rights. See Alexander, 1977-2 Trade Cas. (CCH) P 61,730, at 72,991, 1977 WL 1497, at *9 ("[a]ny settlement or

consent order would have had to deal with future rules in order to afford appropriate relief to plaintiffs and to be acceptable to the defendants"). [FN70]

FN70. The court notes that although courts disagree on its scope, no court has determined that the nonstatutory labor exemption ends before the expiration of the parties' collective bargaining agreement. See supra note 17 (discussing conflict between various labor exemption rulings).

7.27 Based on the foregoing, the court rejects all of the Eagles' objections to the Settlement Agreement.

7.28 Defendants suggest that the court sanction the Philadelphia Eagles because of its objections. Although troubled by the Eagles' apparent disregard of the court's order of February 26, 1993, and the implausibility of the objections raised, the court nonetheless declines to sanction the Eagles at the present time.

7.29 Based on the foregoing, the court makes the following findings of fact and conclusions of law: (a) The terms of the Stipulation and Settlement Agreement fundamentally modify the NFL's rules, policies and practices regarding veteran player movement and employment. The settlement also fundamentally modifies by agreement the college draft, the NFL Player Contract, and various other terms and conditions of NFL player employment. (b) The revised player mobility and

employment rules represent a successful effort by NFL players to eliminate Plan B, and to bring about substantial modifications in the principles relating to veteran player transfers. (c) Under Eighth Circuit law, when evaluating the present Settlement Agreement, it is unnecessary for the court to determine whether every provision of the settlement, if adopted outside a settlement context and made subject to a trial on the merits, would be deemed reasonable after a full rule of reason inquiry. In fact, the court should not make such inquiry. (d) The Settlement Agreement, as a whole, is not per se illegal. (e) The court overrules all objections for the reasons previously set forth, and concludes that the overall agreement is fair, reasonable and adequate to the class.

VIII. MOTIONS TO INTERVENE

8.1 Based on the court's determination that the overall agreement is fair, reasonable and adequate to the class, the court denies all motions to intervene except to the extent that the movants, other than Mr. Sheridan and the Tice plaintiffs, [FN71] shall be permitted to intervene as "intervenor-objectors" solely for purposes of preserving their rights to appeal any judgment entered by the court in connection with the Stipulation and Settlement Agreement. [FN72] See Croyden Assocs. v. Alleco, Inc., 969 F.2d 675, 678-80 (8th Cir.1992) (unnamed class member must move to intervene in order to preserve right to appeal), cert. denied, --- U.S. ----, 113 S.Ct. 1251, 122 L.Ed.2d 650 (1993).

FN71. The Tice plaintiffs are: Gary Hogeboom, William H. Mandley, James J. Skow, Curt E. Singer, Ronald A. Mattes, Shawn Miller, Bob Nelson, Jeff L. Walker, Tim Smiley, Steven W. Baack, Troy Johnson, Thomas D. Sanders and Clifford Charlton.

FN72. Formal motions to intervene were filed on behalf of: Wilber Marshall, Paul Gruber, Terry Orr, Shane Collins, Ron Middleton, Mark Schlereth, Kelly Goodburn, David Gulledge, Ed Simmons, Matt Elliott, Joe Jacoby, Sidney Johnson, Kurt Gouveia, Ravin Caldwell, Mark Rypien, James Jenkins, Johnny Thomas, Eric Williams, Don Warren, Jeff Bostic, Todd Bowles, Ray Brown, Jason Buck, Earnest A. Byner, Desmond Howard, Anthony Johnson, Brian Mitchell, Ricky Sanders and Paul Siever. At the hearing, the following objectors moved to intervene: Byron Evans, Brian Pressler, Jesse Becton, Scott Brown, Rudy Thompson, Ernie Lewis, Eugene Brown, Percy Coleman, James Chinn, Ron Alexander, Brad LaCombe, Dan Purcell, Steve Ross, Ron Moran, Steve Robinson, Garrett Washington, Bennie Hargro, Carl Lee, Mark Dusbabek, Audray McMillian, Felix Wright, Cody Risien, Mark Harper, Don Beebe, Gregory Scales, Sammy Martin, Brian Blades, Mike Farr, Pepper Johnson, Pat Carter, Maurice Hurst and John Fourcade. At the hearing, the court granted various motions to intervene solely for purposes of preserving those parties' right to appeal any judgment entered concerning the Stipulation and Settlement

Agreement. However, the court did not grant those motions for purposes of filing complaints in intervention, or for any other purpose. On April 23, 1993, the following players filed motions to intervene: Sean Jones, Eric Allen, Leslie O'Neal, Eric Sanders, Ken Norton, Jr., Curtis Duncan, Patrick Hunter, William C. Matthews, Cris Dishman, Lomas Brown, Neil Smith, Van Waiters, Broderick Thompson and Jerry Ball.

However, none of the movants shall be considered named "plaintiffs" under the terms of the Stipulation and Settlement Agreement, none of the complaints in intervention shall be filed, and the named parties need not answer or otherwise respond to any of the complaints in intervention. See supra note 72.

The motions to intervene made on behalf of Sean Jones, Eric Allen, Leslie O'Neal, Eric Sanders, Ken Norton, Jr., Curtis Duncan, Patrick Hunter, William C. Matthews, Cris Dishman, Lomas Brown, Neil Smith, Van Waiters, Broderick Thompson and Jerry Ball expressly reserve those players' "jurisdictional and other defenses." As a result of their various filings with the court, their appearance to object to the settlement and their motions to intervene, the court finds that those players have submitted to the court's jurisdiction because they have not confined their arguments to the claim that they are beyond the court's jurisdiction, but rather have objected to the merits of the proposed settlement. See, e.g., Trans World Airlines, Inc.

v. Mattox, 897 F.2d 773, 787 (5th Cir.1990) (finding intervenors waived any objection to personal jurisdiction when their arguments went "to the heart of the issue before the district court"). As discussed below, the court also finds that it has jurisdiction over those players and their individual lawsuits, which are currently pending in the Central District of California, under the All-Writs Act. See infra P 9.3 (finding that the court has such jurisdiction). Accordingly, the court denies their motions to intervene to the extent that those players seek to reserve their jurisdictional defenses.

The Tice plaintiffs originally filed a motion to intervene, but based on the withdrawal of their objections, the court dismisses their motion to intervene as moot.

Mr. Sheridan's motion to intervene, to the extent that it applies to himself, or other agents, is denied for lack of standing. See supra P 7.17 (finding that Sheridan lacked standing to object on behalf of himself or other agents similarly situated).

IX. DEFENDANTS' MOTIONS TO ENJOIN OTHER ACTIONS

9.1 Defendants also move to enjoin various other actions [FN73] in which players assert claims for equitable and monetary relief concerning the same player practices at issue in the present case. [FN74] In support of the motions, defendants rely on this court's: (i) certification of a mandatory Rule 23(b)(1) non-opt-class on January 6, 1993, as amended on February 17, 1993; and (ii) final approval of the Stipulation and Settlement Agreement.

FN73. Those cases are: (a) Hurst v. NFL, No. 92-3263 (E.D.La.); (b) Dusbabek v. NFL, No. 4-93-126 (D.Minn.); (c) Lee v. NFL, No. 4-93-125 (D.Minn.); (d) McMillian v. NFL, No. 4-93-99 (D.Minn.); (e) Wright v. NFL, No. 4-93-124 (D.Minn.); (f) Jones v. NFL, No. 92-2512 (C.D.Cal.); (g) Sanders v. NFL, No. 92-4365 (C.D.Cal.); (h) Matthews v. NFL, No. 92- 4370 (C.D.Cal.); (i) Hunter v. NFL, No. 92-4373 (C.D.Cal.); (j) O'Neal v. NFL, No. 92-4368 (C.D.Cal.); (k) Allen v. NFL, No. 92-7536 (C.D.Cal.); (l) Norton v. NFL, No. 93-0029 (C.D.Cal.); (m) Hurst & Fourcade v. NFL, No. 93-0766 (E.D.La.); (n) Harper v. NFL, No. 4-93-314 (D.Minn.); (o) Risien v. NFL, No. 4-93-182 (D.Minn.); (p) Duncan v. NFL, No. 93-1481 (C.D.Cal.); and (q) Evans v. NFL, Civ. No. 92-878 (D.Ariz.).

FN74. The court rejects various parties' attempts to distinguish their claims from those asserted in the present action, finding that the claims all arise from the same practices at issue in the present action, and are encompassed by the court's certification of the White class.

Opponents to those motions argue that they have a constitutional right to opt out of the White class, that the court has no jurisdiction to grant such motions and that any injunction concerning various lawsuits filed in the Central District of California would be premature. The court will address each contention in turn.

9.2 As previously discussed, the court determines that due process does not require that absent class members be provided with a right to opt out of the White class action. See supra Section III. Accordingly, the court rejects those arguments as a basis for denying defendants' motions to enjoin other actions.

9.3 The court further concludes that it has jurisdiction, pursuant to the All-Writs Act, 28 U.S.C. s 1651, [FN75] to enjoin the various lawsuits subject to defendants' motions. See, e.g., Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co., 342 U.S. 180, 183-84, 72 S.Ct. 219, 221, 96 L.Ed. 200 (1952) (federal courts have "an ample degree of discretion" in determining how best to administer "multiple litigation in the federal judicial system", and such discretion includes the power to stay pending federal court actions); [FN76] In re Joint Eastern & Southern District Asbestos Litig. (Eagle- Picher), 134 F.R.D. 32, 37 (E.D.N.Y. & S.D.N.Y.1990) (under the All-Writs Act, courts have jurisdiction "to certify a national class action and to stay pending federal and state cases brought on behalf of class members"); Robertson v. National Basketball Ass'n, 413 F.Supp. 88, 90 (S.D.N.Y.1976) (enjoining separate federal lawsuit filed by an individual class member in order to protect "the jurisdiction of this court to determine this action, either by trial or by court-approved settlement"). Under the Act, the court may also enjoin actions that were filed, or allegedly filed, [FN77] before the present action. See Kerotest, 342

U.S. at 183, 72 S.Ct. at 221 (federal courts are not bound by rigid doctrines, such as the "first to file" rule because "[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation, does not counsel rigid mechanical solution of such problems"). The court concludes that it has jurisdiction to enjoin those lawsuits pursuant to the All-Writs Act.

FN75. That Act provides in relevant part that: The Supreme Court and all courts established by Act of Congress may issue all writs necessary and appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law. 28 U.S.C. s 1651(a).

FN76. The court rejects any contention that the Supreme Court's holding in Kerotest was limited by considerations of forum non conveniens, as that issue was relevant only to the determination of which court proceeding should be stayed, not to the power of a federal court to stay actions pending in other federal courts. 342 U.S. at 185-86, 72 S.Ct. at 222. Moreover, in light of the long history of related litigation before this court, the court concludes that considerations of forum non conveniens favor the enjoining of the other pending actions, rather than the present action.

FN77. The court rejects the contention that the Hurst class action was filed before the present action. The White class action complaint was filed in this court on September

21, 1992, nine days before the Hurst case was filed in the Eastern District of Louisiana. See Hurst v. National Football League, Civ. No. 92-3263 (E.D.La. filed Oct. 1, 1992). Moreover, subsequent amendments to the White complaint did not initiate new lawsuits. See Fed.R.Civ.P. 15(c). The court finally notes that the Powell class action, which was filed in 1987, is properly considered the "first" class action filed for purposes of the proposed settlement.

Moreover, the court has proper jurisdiction over the White class action. Under such circumstances, the court does not need a separate basis of personal jurisdiction in order to enjoin individual lawsuits of mandatory class members. Cf. In re State of South Dakota, 692 F.2d 1158, 1162 n. 8 (8th Cir.1982) ("jurisdictional considerations under the All-Writs Act have been expanded beyond the technical notions of personal and subject matter jurisdiction"). As the Second Circuit held: the need to enjoin conflicting ... proceedings arises because the jurisdiction of a multidistrict court is 'analogous to that of a court in an in rem action or in a school desegregation case, where it is intolerable to have conflicting orders from different courts.' In effect, ... the district court had before it a class action proceeding so far advanced that it was the virtual equivalent of a res over which the district court required full control. In re Baldwin-United Corp., 770 F.2d 328, 337 (2d Cir.1985) (quotation omitted); accord Battle v. Liberty Nat'l Life Ins. Co., 877 F.2d 877, 882 (11th

Cir.1989) (it "makes sense to consider this case, involving years of litigation and mountains of paperwork, as similar to a res to be administered").

In fact, there is ample authority for the proposition that the court has jurisdiction to enjoin other actions even if the parties were not members of the White class. See, e.g., United States v. New York Tel. Co., 434 U.S. 159, 174, 98 S.Ct. 364, 373, 54 L.Ed.2d 376 (1977) ("the power conferred by the [All-Writs] Act extends, under appropriate circumstances, to persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order"); In re Baldwin- United Corp., 770 F.2d 328, 338 (2d Cir.1985) ("[a]n important feature of the All-Writs Act is its grant of authority to enjoin and bind nonparties to an action when needed to preserve the court's ability to reach and enforce its decision in a case over which it has proper jurisdiction") (citations omitted)). Accordingly, the court rejects any claim that the motions to enjoin must be denied because it lacks personal jurisdiction over any party.

The court concludes that in the present case, it is both necessary and proper to exercise its authority under the All-Writs Act. Based on that authority, the court enjoins the various other pending actions, relying on the following factors: (1) the long history of related litigation in this court; (2) to properly effectuate the terms of the proposed settlement, which the court finds to be fair, reasonable and adequate to class members, and to which class members

received adequate notice and opportunity to object; (3) to conserve judicial resources; (4) to properly protect the court's jurisdiction over the White class action, and to enforce and effectuate its judgment; (5) to eliminate the risk of inconsistent or varying adjudications which may subject defendants to incompatible standards of conduct; (6) to prevent the prosecution of other actions that would frustrate the court's efforts to craft a class action settlement in the present case; (7) to eliminate the risk of inconsistent or varying judgment that may affect the rights of class members and impair their ability to protect their interests; and (8) in light of the court's determination that the White class was properly certified, to utilize the class action mechanism, which is ideally suited for resolving the claims at issue, to settle this massive litigation.

9.4 The court also rejects the contention that defendants' motions to enjoin various suits filed in the Central District of California are premature. Although those actions are stayed at the present time, it is undisputed that those plaintiffs, in their most recent status report to the California district court, stated that they intend to move to lift the stays. The court therefore concludes that defendants' motions are not premature.

Based on the foregoing, the court grants defendants' motions to enjoin various other lawsuits. [FN78]

FN78. See supra note 73 (listing relevant cases).

X. THE LAWFUL FORMATION OF THE NFLPA AS THE EXCLUSIVE COLLECTIVE BARGAINING REPRESENTATIVE OF NFL PLAYERS

10.1 On January 6, 1993, the parties reached an agreement in principle to settle this class action, as well as various other related litigation.

10.2 After an agreement in principle was reached on January 6, 1993, and after a vote of the Board of the NFLPA to seek to become the collective bargaining representative for the players, the NFLPA began to collect authorization cards from NFL players designating it as the exclusive collective bargaining representative of all present and future NFL players.

10.3 By letter dated March 23, 1993, Richard A. Berthelsen, General Counsel of the NFLPA, informed Paul Tagliabue, Commissioner of the NFL that "[a] majority of the players on 1992 season-ending rosters have now signed cards authorizing the NFLPA to represent them for the purposes of collective bargaining."

10.4 In accordance with an agreement between the NFLPA and the NFL, dated March 24, 1993, the American Arbitration Association conducted a check-off of signed cards of interest against the 1992 season-ending rosters. By letter of March 26, 1993, the American Arbitration Association reported that 873 cards had been duly executed and returned by eligible voters, thus establishing the majority standing of the NFLPA.

10.5 By letter dated March 29, 1993, from Harold

Henderson, Executive Vice President for Labor Relations and Chairman of the NFL Management Council, to Eugene Upshaw, Executive Director of the NFLPA, and based upon the evidence verified by the American Arbitration Association that a majority of NFL players have recognized the NFLPA as their exclusive bargaining representative, the NFL voluntarily recognized the NFLPA as the sole and exclusive collective bargaining representative of present and future employee players in the NFL, as set forth in the previous NLRB Certification # 18-RC-8308, dated January 22, 1971.

10.6 Based on the representations and sworn testimony of the parties, it appears that at all times during this process, the NFLPA maintained that it would not accept any help from the NFL, or any of its member clubs. Nor did the NFL, or any of its member clubs, take any action which in any way hindered or supported the formation of the NFLPA as the exclusive collective bargaining representative of all present and future NFL players.

10.7 Based on the foregoing, the court has reached the following conclusions:

(a) The NFLPA has been lawfully formed and selected by the players to serve as the exclusive collective bargaining representative of all present and future NFL players.

(b) Neither the NFL nor any of its members have taken any action which in any way hindered or supported the formation of the NFLPA as the exclusive collective

bargaining representative of all present and future NFL players.

(c) The NFL and its member clubs have lawfully recognized the NFLPA as the players' exclusive collective bargaining representative.

(d) Accordingly, the NFLPA is fully authorized and empowered to enter into a new collective bargaining agreement with the NFL and its member clubs.

Based on the foregoing, IT IS HEREBY ORDERED that:

1. The court denies all motions to intervene on behalf of: Wilber Marshall, Paul Gruber, Terry Orr, Shane Collins, Ron Middleton, Mark Schlereth, Kelly Goodburn, David Gulledge, Ed Simmons, Matt Elliott, Joe Jacoby, Sidney Johnson, Kurt Gouveia, Ravin Caldwell, Mark Rypien, James Jenkins, Johnny Thomas, Eric Williams, Don Warren, Jeff Bostic, Todd Bowles, Ray Brown, Jason Buck, Earnest A. Byner, Desmond Howard, Anthony Johnson, Brian Mitchell, Ricky Sanders, Paul Siever, Byron Evans, Brian Pressler, Jesse Becton, Scott Brown, Rudy Thompson, Ernie Lewis, Eugene Brown, Percy Coleman, James Chinn, Ron Alexander, Brad LaCombe, Dan Purcell, Steve Ross, Ron Moran, Steve Robinson, Garrett Washington, Bennie Hargro, Carl Lee, Mark Dusbabek, Audray McMillian, Felix Wright, Cody Risien, Mark Harper, Don Beebe, Gregory Scales, Sammy Martin, Brian Blades, Mike Farr, Pepper Johnson, Pat Carter, Sean Jones, Eric Allen, Leslie O'Neal, Eric Sanders, Ken Norton, Jr., Curtis Duncan,

Patrick Hunter, William C. Matthews, Cris Dishman, Lomas Brown, Neil Smith, Van Waiters, Broderick Thompson, Jerry Ball, Maurice Hurst and John Fourcade, except to the extent that the foregoing movants shall be permitted to intervene as "intervenor-objectors" solely for purposes of preserving their rights to appeal any judgment entered by the court in connection with the Stipulation and Settlement Agreement. None of the foregoing movants shall be considered named "plaintiffs" under the terms of the Stipulation and Settlement Agreement;

2. Mr. Sheridan's motion to intervene, to the extent that it applies to him individually, or to other agents similarly situated, is denied in all respects;

3. The motion to intervene on behalf of the following players is denied as moot: Gary Hogeboom, William H. Mandley, James J. Skow, Curt E. Singer, Ronald A. Mattes, Shawn Miller, Bob Nelson, Jeff L. Walker, Tim Smiley, Steven W. Baack, Troy Johnson, Thomas D. Sanders and Clifford Charlton;

4. The complaints in intervention shall not be filed, and the named plaintiffs and defendants need not answer or otherwise respond to any such complaints in intervention;

5 The motions to intervene made on behalf of Sean Jones, Eric Allen, Leslie O'Neal, Eric Sanders, Ken Norton, Jr., Curtis Duncan, Patrick Hunter, William C. Matthews, Cris Dishman, Lomas Brown, Neil Smith, Van Waiters, Broderick Thompson and Jerry Ball are expressly denied to the extent that those players seek to reserve their

jurisdictional defenses;

6. The motions to extend time are granted to the extent that the court previously granted such motions on the record, that is, all motions to extend time filed on or before April 16, 1993, are granted; all motions to extend time made at the hearing on April 16, 1993, are granted; and no objections filed after April 16, 1993, will be considered by the court;

7. Defendants' motions to enjoin the following actions are granted: (a) Hurst v. NFL, No. 92-3263 (E.D.La.); (b) Dusbabek v. NFL, No. 4-93-126 (D.Minn.); (c) Lee v. NFL, No. 4-93-125 (D.Minn.); (d) McMillian v. NFL, No. 4-93-99 (D.Minn.); (e) Wright v. NFL, No. 4-93-124 (D.Minn.); (f) Jones v. NFL, No. 92-2512 (C.D.Cal.); (g) Sanders v. NFL, No. 92-4365 (C.D.Cal.); (h) Matthews v. NFL, No. 92-4370 (C.D.Cal.); (i) Hunter v. NFL, No. 92-4373 (C.D.Cal.); (j) O'Neal v. NFL, No. 92-4368 (C.D.Cal.); (k) Allen v. NFL, No. 92-7536 (C.D.Cal.); (l) Norton v. NFL, No. 93-0029 (C.D.Cal.); (m) Hurst & Fourcade v. NFL, No. 93-0766 (E.D.La.); (n) Harper v. NFL, No. 4-93-314 (D.Minn.); (o) Risien v. NFL, No. 4-93-182 (D.Minn.); (p) Duncan v. NFL, No. 93-1481 (C.D.Cal.); and (q) Evans v. NFL, Civ. No. 92-878 (D.Ariz.).

All members of the plaintiff class in the present action are permanently enjoined from further pursuit or prosecution of the above listed actions, or any other actions now pending that purport to challenge the same player

practices at issue here, or challenge the Stipulation and Settlement Agreement in this action. In addition, all members of the plaintiff class are permanently enjoined from initiating any such actions in the future. The court shall also retain jurisdiction over this action to effectuate and enforce the terms of the injunctions and Stipulation and Settlement Agreement;

8. Defendants' request to sanction the Philadelphia Eagles is denied; and

9. The Philadelphia Eagles' motion for leave to file a response to the named parties' proposed findings of fact and conclusions of law is granted.

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 9105 Sunset Boulevard, West Hollywood, California 90069; that on April 18, 1995, I served the within *Appendix For Petition For Writ of Certiorari (Volume IV of IV)* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on April 18, 1995, Los Angeles, California.

Betty J. Malloy
(Original Signed)

Nos. 94-1749, 1750

Supreme Court, U.S.
FILED
MAY 22 1995
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

SEAN JONES, *et al.*, MARK DUSBABEK, *et al.*,

Petitioners,

—v.—

REGGIE WHITE, *et al.*,

Respondent/Plaintiffs,

NATIONAL FOOTBALL LEAGUE, *et al.*,

Respondent/Defendants.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT/PLAINTIFFS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the lower courts erred in finding that Petitioners submitted to personal jurisdiction by filing appearances and voluntarily challenging the merits of a proposed class action settlement agreement.

2. Whether, as a matter of fact, Petitioners waived any due process challenge to the District Court's certification of a Rule 23(b)(1) non-opt-out class.

3. Whether the District Court's approval of a class action settlement agreement as fair, reasonable and adequate to class members, and the Court of Appeal's affirmance of that approval, constituted an abuse of discretion.

PARTIES TO THIS PROCEEDING

The Petitioners in this proceeding are eighteen individual class members out of a class of over 5,000. They are Sean Jones, Leslie O'Neal, Eric Allen, Cris Dishman, William Matthews, and Van Waiters (the "California Objectors"); Mark Dusbabek, Carl Lee, Audray McMillian, Felix Wright, Cody Risien, Mark Harper, Sammy Martin, Don Beebe, and Gregory Scales (the "Viking Objectors"); Maurice Hurst, John Fourcade, and Byron Evans. Petitioners appeared and voluntarily objected to the merits of a class action settlement in proceedings before the United States District Court for the District of Minnesota, and were appellants before the United States Court of Appeals for the Eighth Circuit.

Respondent/Plaintiffs Reggie White, Michael Buck, Hardy Nickerson, Vann McElroy, and Dave Duerson were plaintiffs and class representatives in the proceedings before the District Court, and appellees before the Court of Appeals.

Respondent/Defendants the National Football League and its twenty-eight member clubs ("NFL") were defendants in the proceedings before the District Court, and appellees before the Court of Appeals.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
PARTIES TO THIS PROCEEDING	ii
TABLE OF AUTHORITIES	iv
RULES INVOLVED	1
STATEMENT OF THE CASE	2
ARGUMENT	12
THE FACT-SPECIFIC, UNANIMOUS DECISION OF THE COURT OF APPEALS APPROVING THIS CLASS ACTION SETTLEMENT AGREEMENT DOES NOT RAISE ANY ISSUE WARRANTING THIS COURT'S REVIEW	12
A. This Case Does Not Properly Present Any Constitutional Issue Concerning The Application Of Rule 23(b)(1) To Absent Class Members	13
B. Even If The Due Process Issue Was Properly Presented, Certification Of This Rule 23(b)(1) Class Would Not Conflict With *Shutts*	17
C. The Lower Courts' Approval Of The Settlement Agreement As Fair, Reasonable, And Adequate To Class Members Presents No Issue Warranting This Court's Review	19
CONCLUSION	24

TABLE OF AUTHORITIES

Cases PAGE

Alexander v. NFL, 1977-2 Trade Cas. (CCH) ¶ 61,730 (D. Minn. 1977) 18

Alger v. Hayes, 452 F.2d 841 (8th Cir. 1972) 15

Arata v. Nu Skin International, Inc., 1993 WL 321710 (9th Cir.) (opinion not reported) 18

Arnold v. United Artists Theater Circuit, Inc., 158 F.R.D. 439 (1994), *motion to reconsider or certify for interlocutory appeal denied*, (N.D. Cal. Sept. 15, 1994) 17, 18

Berenyi v. District Director, Immigration and Naturalization Service, 385 U.S. 630 (1967) 16, 20

Bowling v. Pfizer, Inc., 143 F.R.D. 141 (S.D. Ohio 1992) 23

Branti v. Finkel, 445 U.S. 507 (1980) 16, 20

Broadcast Music, Inc. v. M.T.S. Enterprises, 811 F.2d 278 (5th Cir. 1987) 15

Brown v. Ticor Title Insurance Co., 982 F.2d 386 (9th Cir. 1992), *cert. dismissed*, 114 S. Ct. 1359 (1994) 17, 18

Califano v. Yamasaki, 442 U.S. 682 (1979) 21

Capital Investors Co. v. Executors of Estate of Morrison, 800 F.2d 424 (4th Cir. 1986) 15

Continental Bank, N.A. v. Meyer, 10 F.3d 1293 (7th Cir. 1993) 15

PAGE

Datskow v. Teledyne, Inc., Continental Products Division, 899 F.2d 1298 (2d Cir.), *cert. denied*, 498 U.S. 854 (1990) 15

Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974)... 20

Enterprise Energy Corp. v. Columbia Gas Transmission Corp., 137 F.R.D. 240 (S.D. Ohio 1991) 23

Evans v. Jeff D., 475 U.S. 717 (1986) 21

Goodman v. Lukens Steel Co., 482 U.S. 656 (1987)... 20

Graver Tank & Manufacturing Co. v. Linde Air Products, 336 U.S. 271 (1949) 16, 20

Grunin v. International House of Pancakes, 513 F.2d 114 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975) 20, 21

Huguley v. General Motors Corp., 128 F.R.D. 81 (E.D. Mich. 1989) *aff'd*, 925 F.2d 1464 (6th Cir.), *cert. denied*, 502 U.S. 909 (1991) 23

In re Corrugated Container Antitrust Litig., 643 F.2d 195 (5th Cir. 1981)..... 23

In re Jac .son Lockdown/MCO Cases, 107 F.R.D. 703 (E D. Mich. 1985) 17, 23

In re Texas Eastern Transmission Corp., 15 F.3d 1230 (3d Cir.), *cert. denied*, 115 S. Ct. 291 (1994) 15

In re Wolverine Radio Co., 930 F.2d 1132 (6th Cir. 1991) 15

Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982) 15

Jackson v. NFL, 802 F. Supp. 226 (D. Minn. 1992).....4, 22

PAGE

League of Martin v. City of Milwaukee, 588 F. Supp. 1004 (E.D. Wis. 1984) 24

Leroy v. Great Western United Corp., 443 U.S. 173 (1979) 14, 15

Lo Re v. Chase Manhattan Corp., 19 Fed. Empl. Prac. Cas. (BNA) 1366, 1369 (S.D.N.Y. 1979) 24

Luevano v. Campbell, 93 F.R.D. 68 (D.D.C. 1981) 23

Marcial Ucin, S.A. v. SS Galicia, 723 F.2d 994 (1st Cir. 1983) 15

NCAA v. Board of Regents, 468 U.S. 85 (1984) 20

Neirbo Co. v. Bethlehem Ship Building Corp., 308 U.S. 165 (1939) 15

Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340 (1978) 20

Pardazi v. Cullman Medical Center, 896 F.2d 1313 (11th Cir. 1990) 15

Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) 13, 14, 17

Pipkin v. United States Postal Service, 951 F.2d 272 (10th Cir. 1991) 15

Powell v. NFL, 930 F.2d 1273 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991) 4

Robertson v. NBA, 72 F.R.D. 64 (S.D.N.Y. 1976), *aff'd*, 556 F.2d 682 (2d Cir. 1977) 18, 19

Rogers v. Lodge, 458 U.S. 613 (1982) 16, 20

Thornton v. East Texas Motor Freight, 497 F.2d 416 (6th Cir. 1974) 23

PAGE

Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C., 467 U.S. 138 (1984).. 13

Ticor Title Insurance Co. v. Brown, __ U.S. __, 114 S. Ct. 1359 (1994) 2, 14, 16

United States v. Doe, 465 U.S. 605 (1984) 16, 20

United States v. Johnston, 268 U.S. 220 (1925) 20

United States v. Vacant Land Located at 10th Street and Challenger Way in Palmdale, Cal., 15 F.3d 128 (9th Cir. 1993)..... 15

White v. National Football League, 822 F. Supp. 1389 (D. Minn. 1993) ..... *passim*

White v. National Football League, 836 F. Supp. 1458 (D. Minn. 1993) ..... *passim*

White v. National Football League, 41 F.3d 402 (8th Cir. 1994) ..... *passim*

Women's Committee v. National Broadcasting Co., 76 F.R.D. 173 (S.D.N.Y. 1977) 24

Statutes

Fed. R. Civ. P. 23(b)(1) ..... *passim*

Fed. R. Civ. P. 23(e)..... 20

Supreme Court Rule 10 12

Miscellaneous

7B C. Wright, A. Miller & M. Kane. *Federal Practice & Procedure* § 1789 (2d ed. 1986)..... 17

1 H. Newberg & A. Conte, *Newberg On Class Actions* §§ 1.19, 1.20 (3d ed. 1992) 17, 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

Nos. 94-1749, 1750

SEAN JONES, *et al.*, MARK DUSBABEK, *et al.*,
Petitioners,

—v.—

REGGIE WHITE, *et al.*,
Respondent/Plaintiffs,

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Respondent/Defendants.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT/PLAINTIFFS IN OPPOSITION

RULES INVOLVED

Certification and settlement of the class action below was carried out pursuant to Federal Rule of Civil Procedure 23.

STATEMENT OF THE CASE

Introduction

Petitioners—18 individual members of a class of more than 5,000—seek this Court's review of orders of the United States Court of Appeals for the Eighth Circuit and the United States District Court for the District of Minnesota, approving as fair, reasonable, and adequate a class action stipulation and settlement agreement (the "Settlement Agreement") between Respondent/Defendants, The National Football League and its 28 member clubs (the "NFL"), and Respondent/Plaintiffs Reggie White, *et al.*, on behalf of themselves and a class of current and former professional football players (the "Class").[1]

Although petitioners try mightily to portray this action as raising the same constitutional issue which this Court initially granted certiorari to review in *Ticor Title Insurance Co. v. Brown*, __ U.S. __, 114 S. Ct. 1359 (1994), that due process issue was never reached or decided by the Court of Appeals below. *See White v. National Football League*, 41 F.3d 402 (8th Cir. 1994). To the contrary, the Court of Appeals unanimously affirmed the District Court's decision on the more narrow grounds that: (i) Petitioners had waived any due process objections because they had submitted themselves to the

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[1] The Settlement Agreement is the cornerstone of a global litigation settlement resolving six years of litigation, including two dozen separate lawsuits, between the NFL and professional football players. The Settlement Agreement, which has been operating successfully in the NFL for the past two seasons, has provided these players for the first time in history with a comprehensive system of meaningful free agency; and further provides monetary relief, in the amount of $115 million, to class members who were injured as a result of the player restrictions that were in place in the NFL from 1989 through 1992. The new free agency system created by the Settlement Agreement has now been included in a Collective Bargaining Agreement ("CBA"). The CBA was overwhelmingly approved by more than 96% of the NFL players who voted. *White v. National Football League*, 836 F. Supp. 1458, 1467 (D. Minn. 1993).

District Court's jurisdiction by voluntarily litigating the *merits* of the Settlement Agreement (as opposed to just contesting jurisdiction); and (ii) the Settlement Agreement was fair, reasonable and adequate, and in the best interests of the Class. Neither of these fact-specific determinations presents any conflict with the decisions of this Court or any circuit court; nor do they present any significant issue of law that would warrant a grant of certiorari in this case.

The *White* Case And Its Predecessors

On September 21, 1992, Respondent/Plaintiffs commenced the *White* case on behalf of themselves and a class of professional football players against Respondent/Defendants, the NFL and its twenty-eight member clubs. The complaint initially sought only injunctive relief, but was later amended to also seek antitrust damages arising out of, *inter alia*, the operation of various restraints on competition for NFL player services, including the so-called "Plan B" right of first refusal/compensation ("RFR/C") rules, the college draft, the Uniform NFL Player Contract and the NFL's pre-season pay rules. *See White v. National Football League*, 836 F. Supp. 1458, 1462 (D. Minn. 1993).[2] Defendants answered the *White* complaint, denying all material allegations and asserting various affirmative defenses. *Id.* Thereafter, plaintiffs moved for a preliminary injunction to prohibit the continued imposition of the Plan B rules or any similar restrictions, and to permit players whose contracts expired to sell their services to other NFL

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[2] Under the Plan B RFR/C rules which were in effect for the 1989 through 1992 NFL seasons, each NFL club "restricted" 37 veteran players, whether or not those players remained under contract to the team. Pursuant to Plan B, a team had the right to match any offer made by another NFL club to one of its restricted players (the right of first refusal); further, if the player's former club did not choose to match such an offer, the old club was entitled to receive "compensation" from the acquiring club in the form of one or more draft choices from the NFL's college draft. *White v. National Football League*, 822 F. Supp. 1389, 1480 (D. Minn. 1993).

teams. *White v. National Football League*, 822 F. Supp. 1389, 1395 (D. Minn. 1993).

The *White* action followed closely on the heels of two other lawsuits previously filed in the United States District Court for the District of Minnesota challenging the Plan B RFR/C rules. On September 10, 1992, following a three month trial before Judge David S. Doty, the jury in *McNeil v. NFL*, 4-90-476 (D. Minn.)—a lawsuit brought by eight professional football players against the NFL and its member clubs—found that the Plan B RFR/C rules violated Section 1 of the Sherman Act, 15 U.S.C. § 1, because they: (i) substantially harmed "competition in the relevant market for the services of professional football players"; and (ii) were "more restrictive than reasonably necessary." *White*, 822 F. Supp. at 1398. The jury found that all eight *McNeil* plaintiffs suffered antitrust injury, but awarded damages to only four. *Id.*

Shortly after the jury returned its verdict in *McNeil*, ten individual NFL players who had not signed contracts for the already commenced 1992 NFL season brought an antitrust action against the NFL and its clubs seeking, *inter alia*, injunctive relief, to stop the Plan B rules from being applied to them. *Jackson v. NFL*, 802 F. Supp. 226 (D. Minn. 1992). On September 24, 1992, Judge Doty issued a temporary restraining order against the continued operation of Plan B, thereby permitting those ten players to sign contracts with any NFL clubs. *Id.* at 235.

Each of the above cases, as well as numerous other suits brought by individual NFL players against the NFL Clubs, were financially supported by the National Football League Players Association ("NFLPA"), which is currently the collective bargaining representative for all NFL players.[3]

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[3] After the Eighth Circuit ruled on November 1, 1989, in *Powell v. NFL*, 930 F.2d 1273 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991), that previously agreed to player restrictions were exempt from antitrust challenge as long as the players continued to be represented by

The Global Litigation Settlement

On January 6, 1993, the parties to *White*, *McNeil*, *Jackson* and over twenty other lawsuits involving professional football players and NFL teams reached agreement in principle on a global settlement of these lawsuits, with the *White* class action settlement as its centerpiece. *White*, 822 F. Supp. at 1435.

By order dated January 6, 1993, as amended and reaffirmed on February 17, 1993, the District Court in *White* certified, for the purposes of settlement, a damages and injunctive relief class, pursuant to Fed. R. Civ. P. 23(b)(1), consisting of:

> (i) all players who have been, are now, or will be under contract to play professional football for an NFL club at any time from August 31, 1987 to the date of final approval of the settlement of this action and the determination of any appeal therefrom, and (ii) all college and other football players who, as of August 31, 1987, through the date of final approval of the settlement of this action and the determination of any appeals therefrom, have been, are now, or will be eligible to play football as a rookie for an NFL team.

On February 26, 1993, the plaintiffs and defendants in *White* formally entered into the class action Settlement Agree-

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a union, a majority of NFL players voted to terminate the NFLPA's union status. Thereafter, the NFLPA was reconstituted as a professional association, which financed and supported litigation by players against the NFL, such as the *McNeil* and *White* actions, aimed at ending unreasonable restrictions on players' freedom of movement.

After an agreement in principle was reached settling the *White* class action, the NFLPA sought once again to become the collective bargaining representative for NFL players. *White*, 822 F. Supp. at 1396. Subsequently, the NFLPA was authorized by a majority of NFL players to represent them for purposes of collective bargaining, and by letter dated March 29, 1993, the NFL recognized the NFLPA as the sole and exclusive collective bargaining representative of present and future NFL players. *Id.* at 1397, 1435.

ment. In addition, the parties to the related NFL player lawsuits being supported by the NFLPA reached agreements to separately settle those actions. *White*, 822 F. Supp. at 1395-96. The concurrent resolution of the *White* class action with twenty-three related lawsuits supported by the NFLPA brought an end to seven years of litigation between the NFL teams and their players.

Proceedings Before the District Court

The District Court evaluated the *White* Settlement Agreement using "the two-stage procedure suggested in the *Manual for Complex Litigation*, § 30.44, at 241-42 (2d ed. 1985)." *White*, 822 F. Supp. at 1399. First, after a preliminary hearing on February 26, 1993, at which a few class members appeared in opposition to the Settlement Agreement, the District Court determined that "the proposed settlement fell within the range of possible approval." *Id.* Second, the District Court ordered that notice of the Settlement Agreement, which provided that objectors would have an opportunity to appear and be heard at a final approval hearing, be mailed to individual class members and published. *Id.*

Pursuant to the Court's order, plaintiffs mailed notice of the Settlement Agreement to over 5,000 class members at their last-known addresses, and published notice of the agreement in the *USA Today* newspaper. *Id.* at 1400. In response, 58 class members, one player agent, and one defendant submitted briefs and affidavits in opposition to the Settlement Agreement on or before the April 2 deadline reflected in the notice. In addition, the District Court accepted and considered briefs and affidavits on behalf of thirty other class members who submitted their briefs after this deadline. In total, more than 50 briefs and affidavits, comprising thousands of pages, were submitted by both supporters and opponents of the Settlement Agreement for the District Court's review. *Id.* at 1424-25.

On April 16, 1993, the District Court held a final approval hearing, at which parties and class members were given the opportunity to be heard in support of or in opposition to the Settlement Agreement, irrespective of whether they had previously submitted their positions in writing. At the hearing, which lasted over ten hours, parties and objectors presented oral argument, and witnesses, who were subject to cross-examination, testified in favor of, or against, the Settlement Agreement. *Id.* Each of the Petitioners herein submitted briefs attacking the merits of the Settlement Agreement and voluntarily appeared, in person or through counsel, at the final approval hearing to contest the merits of the Settlement Agreement.

Based upon an exhaustive review of the record before him, on April 30, 1993, Judge David S. Doty issued a 115-page Order in which he found that the Settlement Agreement was fair, reasonable, adequate and in the best interests of the Class. Among the benefits to the Class found by the District Court were: (i) a "radically modified player reservation system," pursuant to which almost all players with at least five years of experience (four, if a salary cap is in place) would have the opportunity to become unrestricted free agents (822 F. Supp. at 1419); (ii) substantially increased "tender" requirements before a club could limit the free agency rights of those players still subject to some restrictions (*id.*); (iii) significantly reduced restrictions on those players who are still subject to free agency limitations (*id.*); (iv) a greatly reduced number of rookies subject to the NFL's college draft, due to a reduction in the number of rounds of the draft from twelve to seven (*id.*); (v) strict anti-collusion provisions, to deter and punish collusion by or between the NFL and its teams (*id.*); (vi) guaranteed annual payments to players in salaries and benefits of at least fifty-eight percent of defined revenues (in any year in which there is a salary cap), the highest such guarantee in professional team sports; and (vii)

settlement payments to class members of $115 million ($17 million of which has already been distributed (*id.*)).[4]

In addition, the District Court found, *inter alia*, that: (i) objections to specific provisions of the Settlement Agreement by a small number of class members did not merit disapproval because the "Agreement as a whole is fair, reasonable and adequate to the class" (822 F. Supp. at 1426); (ii) mail and publication notice to the Class satisfied "the requirements of [Fed. R. Civ. P.] 23 and due process" (*id.* at 1402); (iii) the plaintiffs and class counsel "competently and vigorously represented the interests" of the Class (*id.* at 1405); and (iv) the individual objectors had waived any due process objections to a non-opt-out class and submitted to the court's jurisdiction, because they did not confine "their arguments to the claim that they [were] beyond the court's jurisdiction" but rather "objected to the merits of the proposed settlement" (*id.* at 1432).

Following preliminary approval, the unprecedented free agency system created by the Settlement Agreement became effective. 822 F. Supp. at 1420. As a result, class members have already enjoyed the substantial benefits of this new system for more than two years. During this period, hundreds of NFL players have switched clubs as Unrestricted Free Agents; many more Restricted Free Agents have received offers from other teams than ever did under Plan B; and average player salaries throughout the NFL have increased by more than fifty percent, providing hundreds of millions of dollars in addi-

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[4] In addition, it was agreed that the named plaintiffs in *White* and *Lewis v. NFL*, Civ. A. No. 91-2685 (D.D.C.), would receive the following amounts: Reggie White - $0; Michael Buck - $134,805; Vann McElroy - $470,194; Hardy Nickerson - $494,836; Albert Lewis - $711,600; and Wayne Radloff - $214,115. The named plaintiff for pre-season pay claims, Dave Duerson, will receive $98,302. These sums reflect the amount of damages these plaintiffs would have sought at trial, before trebling, and will not be paid from the $115 million *White* Settlement Fund. *White*, 822 F. Supp. at 1415.

tional compensation to class members. *See White*, 836 F. Supp. at 1479-80.

In addition to the new free agency system, and the $115 million in damages paid into the *White* Settlement Fund, substantial additional benefits to class members were provided by other parts of the global litigation settlement, as set forth below:

Back Pay - The settlement of *NFLPA v. NFL Management Council*, a lawsuit commenced on behalf of all NFL players who were denied one week's pay after returning to work at the end of the 1987 players' strike, provided for payment by the NFL to the striking players, all of whom are *White* class members, of $30 million. *White*, 822 F. Supp. at 1415.

Individual Player Lawsuits - In addition to the *McNeil* and *Jackson* cases, there were eight other lawsuits by individual players, supported by the NFLPA, that predated the *White* class action. These lawsuits challenged the legality of Plan B and other restrictions on player employment. All of these cases, plus *McNeil*, *Jackson*, *Lewis* and *Powell*, were found to have contributed substantially to the ability of class counsel to negotiate the *White* Settlement Agreement on terms highly favorable to the Class. *White*, 822 F. Supp. at 1405, 1407. The related player actions were settled separately for payments totalling $19,028,628. *Id.* at 1416.[5]

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[5] The other player lawsuits settled at this time included: *Joyner v. NFL*, Civ. No. 92-2876 (E.D. Pa.); *Allen v. Chargers Football Co.*, Civ. No. 91-4322 (C.D. Cal.); *Hebert v. Los Angeles Raiders*, Civ. No. S023546 (Sup. Ct. Cal.); *Solomon v. NFL*, Civ. No. 92-1244-F (D. Tex.); *Morris v. New York Giants, Inc.* (Arbitration before Hon. Bernard S. Meyer); *Chandler v. Indianapolis Colts, Inc.*, Civ. No. 54601-9009-CP-0453 (Ind. Cir. Ct.); *Mullin v. Los Angeles Rams Football Co.*, No. B063729 (Cal. Ct. App.); *Tice v. Pro Football, Inc.*, Civ. No. 91-2314 (D.D.C.); *Powell v. NFL*, Civ. No. 4-87-917 (D. Minn.), No. 91-3430MN (8th Cir.); *Five Smiths v. NFLPA*, Civ. No. 4-90-261 (D. Minn), No. 92-2118MN (8th Cir.); and *NFL v. NFLPA and Hilton*, Civ. No. 4-91-877 (D. Minn.).

Reimbursement To The NFLPA Of Litigation Expenses- All of the actions mentioned above, including *McNeil, Jackson, Lewis* and *White*, were funded by the NFLPA. As part of the global litigation settlement, the NFL Clubs agreed to pay the NFLPA, for the benefit of NFL players, $18,847,520, as partial reimbursement for the attorneys' fees, disbursements and other expenses it incurred to support the *McNeil* case, the *White* case, and all related player lawsuits. *White*, 822 F. Supp. at 1416.[6]

When considered with the $115 million that will be directly distributed as part of the *White* settlement, a total of $195 million will be disbursed for the benefit of NFL players.

On May 6, 1993, the NFL and the NFLPA reached agreement on the terms of a new collective bargaining agreement (the "CBA"). The CBA incorporated most of the terms of the *White* Settlement Agreement relating to the new free agency system. In addition, as a result of the CBA, the NFL defendants and class counsel agreed to amend a few specific provisions of the *White* Settlement Agreement, and class plaintiffs moved the District Court to approve these amendments. *White*, 836 F. Supp. at 1469. The CBA was subsequently ratified by 96% percent of the NFL players who voted on ratification. *Id.* at 1467, 1485.

The District Court held a preliminary approval hearing on the proposed amendments to the Settlement Agreement on

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[6] In addition, as part of the global litigation settlement, the parties to various lawsuits between and among the NFLPA, NFL Properties, Inc. (the NFL's licensing arm), various individual players, and various NFLPA and NFL Properties licensees, also reached a settlement of their lawsuits, under which the right of NFL players to engage in group licensing through the NFLPA was preserved and recognized. In addition, the NFLPA received $10 million in settlement payments and a guarantee of at least $5 million a year in additional licensing revenues from 1993 through 1999. All of the monies received by the NFLPA pursuant to this settlement will be distributed to, or used directly for the benefit of, NFL players. *White*, 822 F. Supp. at 1415-16; *White*, 836 F. Supp. at 1476.

June 1, 1993. Notice of the hearing was provided to all class members, including Petitioners, who had previously objected to approval of the Settlement Agreement. In an order dated June 2, 1993, the District Court preliminarily approved the proposed amended Settlement Agreement, ordered that notice again be mailed to class members and published, and gave all class members the opportunity to object in writing to the proposed amended Settlement Agreement. Plaintiffs thereafter mailed notice to the over 2,500 class members who were likely to be affected by the amendments to the Settlement Agreement and once again published notice in *USA Today*. *White*, 836 F. Supp. at 1469.

Twenty-eight class members, all of whom had previously objected, and one defendant, submitted briefs and affidavits in opposition to the amended Settlement Agreement. A second "final" approval hearing was held on July 7, 1993, during which class members were again given the opportunity to present oral argument and testimony in opposition to the amended Settlement Agreement. *Id.* at 1470. After considering all of the evidence and arguments presented, on August 20, 1993, the District Court entered a 116-page order in which the Court reaffirmed its prior order and concluded that the amended Settlement Agreement, as a whole, was in the best interests of the Class and should be approved.

Proceedings Before the Court of Appeals

On appeal, the Eighth Circuit affirmed the District Court's determination that the Settlement Agreement was fair, reasonable and adequate, and in the best interests of the Class. *White*, 41 F.3d at 408. Further, the Court of Appeals unanimously held that "each of the objectors either had minimum contacts with the forum or submitted himself to the jurisdiction of the District Court by appearing through counsel to contest the merits of the settlement, offering testimony, cross-examining witnesses, and filing numerous memoranda of law regarding the settlement." *Id.* Based on this factual determi-

nation of waiver, the Court of Appeals found it unnecessary to "reach the [constitutional] issue raised by the objectors" regarding "whether a trial court may certify a non-opt-out plaintiff class in an action brought primarily for injunctive relief under Fed. R. Civ. P. 23(b)(1)." *Id.*

The Court of Appeals also rejected the claim by certain objectors that "the named plaintiffs and their counsel inadequately represented the class." *Id.* To the contrary, the Court of Appeals found "substantial evidence that the settlement agreement provides significant benefits to the class" from which the District Court "reasonably concluded that the interests of the plaintiff class were protected by the settlement agreement." *Id.* In addition, the Court of Appeals held that "class members received adequate notice of the proposed settlement and were given multiple opportunities to challenge their inclusion in the plaintiff class." *Id.* at 408-09.

An order denying the motion by certain Petitioners for rehearing *en banc* was entered by the Court of Appeals on January 20, 1995.

ARGUMENT

THE FACT-SPECIFIC, UNANIMOUS DECISION OF THE COURT OF APPEALS APPROVING THIS CLASS ACTION SETTLEMENT AGREEMENT DOES NOT RAISE ANY ISSUE WARRANTING THIS COURT'S REVIEW

The decision of the Court of Appeals does not present any "special" or "important" question of federal law which would warrant review by this Court. Supreme Court Rule 10. There is no conflict with the decisions of any circuit or the prior decisions of this Court. Nor is there any legal question of exceptional importance resolved by the decision below.

Contrary to the claims of Petitioners, their "due process" challenge to the application of a Rule 23(b)(1) class certifi-

cation to absent class members was never decided by the Court of Appeals below. Instead, all that the Court of Appeals did, in a unanimous opinion, was apply well-established authority to: (i) affirm, as a factual matter, that the individual objectors had waived their due process argument by voluntarily appearing and challenging the *merits* of the *White* Settlement Agreement; (ii) determine that the notice to the Class was proper and that the Class was adequately represented; and (iii) determine that the District Court did not abuse its discretion in concluding that the Settlement Agreement was fair, reasonable, adequate and in the best interests of the Class. *White*, 41 F.3d 402. None of these fact-based determinations present any issue warranting review by this Court.

A. This Case Does Not Properly Present Any Constitutional Issue Concerning The Application Of Rule 23(b)(1) To Absent Class Members

Petitioners claim to be seeking review of the application of this Court's decision in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), to a Rule 23(b)(1) class action. That due process issue, however, was never reached or decided by the Court of Appeals below, and thus is not properly presented by the petitions. Rather, the Court of Appeals simply applied well-established authority to conclude that, as a factual matter, each of the objectors had, by their actions, subjected themselves to the jurisdiction of the District Court (thus precluding any due process objections).

"It is a fundamental rule of judicial restraint . . . that this Court will not reach constitutional questions in advance of the necessity of deciding them." *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C.*, 467 U.S. 138, 157 (1984), and cases cited therein. It thus has been this Court's uniform "practice to avoid the unnecessary decision of novel constitutional questions" when there exists a sufficient non-constitutional basis for resolving a dispute. *See*

Leroy v. Great Western United Corp., 443 U.S. 173, 181 (1979); *Ticor Title Insurance Co. v. Brown*, __ U.S. __, 114 S. Ct. 1359 (1994). As the Court of Appeals concluded, a non-constitutional basis for the decision below (waiver) exists here, and thus there was and is no need to reach the due process issue asserted by Petitioners.

Petitioner's constitutional argument is premised upon the decision in *Shutts*, where this Court determined that, in a class action "wholly or predominantly for money judgments," a court could, consistent with due process, bind absent class members, not otherwise subject to the jurisdiction of the court, to a class action settlement, so long as it provided a number of procedural protections, including the right to opt-out. 472 U.S. at 811-12 & n.3. The new constitutional issue asserted by Petitioners is whether, consistent with the holding of *Shutts*, a court may bind absent class members, who are not otherwise subject to the jurisdiction of the court, to a non-opt-out Rule 23(b)(1) class, in which injunctive relief is predominant but money damages are also being sought. The Court of Appeals, however, never decided this constitutional issue because of its factual determination that Petitioners had voluntarily submitted themselves to the District Court's jurisdiction by arguing the merits of the Settlement Agreement.

Specifically, the Court of Appeals unanimously determined, as a factual matter, that each of the Petitioners submitted to the jurisdiction of the District Court, rather than making a special appearance solely to contest jurisdiction. In particular, the Court of Appeals found that "each of the [Petitioners] either had minimum contacts with the forum or submitted himself to the jurisdiction of the District Court by appearing through counsel to contest the merits of the settlement, offering testimony, cross-examining witnesses, and filing numerous memoranda of law regarding the settlement." *White*, 41 F.3d at 408; *White*, 836 F. Supp. at 1503 nn. 92-95. Accordingly, the Court of Appeals found that Petitioners had waived any jurisdictional objections to the Rule 23(b)(1) non-opt-out

class so that it was unnecessary to reach the constitutional issue posed by Petitioners. *White*, 41 F.3d at 408; *White*, 836 F. Supp. at 1503 nn. 92-95.

There is clearly no conflict between the Court of Appeals' determination that Petitioners submitted to the jurisdiction of the District Court by their decision to argue the merits of the Settlement Agreement, and any prior rulings of this Court or the various circuits. Indeed, this Court has long recognized that personal jurisdiction is a "personal privilege" of a party that may be waived. *See Leroy*, 443 U.S. at 180; *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982); *Neirbo Co. v. Bethlehem Ship Building Corp.*, 308 U.S. 165, 168 (1939) (the defense of lack of personal jurisdiction is a privilege, and can be lost in a number of ways, including "by failure to assert it seasonably, by formal submission in a cause, *or by submission through conduct*") (emphasis added). Applying this authority, every Court of Appeals has held that a party may submit itself to personal jurisdiction by actively litigating the merits of a case.[7]

Accordingly, the only jurisdictional issue decided by the Court of Appeals, and presented on this appeal, is the factual question of whether, by their actions, Petitioners submitted to

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[7] *See, e.g., Marcial Ucin, S.A. v. SS Galicia*, 723 F.2d 994, 997 (1st Cir. 1983); *Datskow v. Teledyne, Inc., Continental Products Division*, 899 F.2d 1298, 1303 (2d Cir.), *cert. denied*, 498 U.S. 854 (1990); *In re Texas Eastern Transmission Corp.*, 15 F.3d 1230, 1236 (3d Cir.), *cert. denied*, 115 S. Ct. 291 (1994); *Capital Investors Co. v. Executors of Estate of Morrison*, 800 F.2d 424, 429 (4th Cir. 1986); *Broadcast Music, Inc. v. M.T.S. Enterprises*, 811 F.2d 278, 279 (5th Cir. 1987); *In re Wolverine Radio Co.*, 930 F.2d 1132, 1138 (6th Cir. 1991); *Continental Bank, N.A. v. Meyer*, 10 F.3d 1293, 1297 (7th Cir. 1993); *Alger v. Hayes*, 452 F.2d 841, 842-43 (8th Cir. 1972); *United States v. Vacant Land Located at 10th Street and Challenger Way in Palmdale, Cal.*, 15 F.3d 128, 131 (9th Cir. 1993); *Pipkin v. United States Postal Service*, 951 F.2d 272, 274 (10th Cir. 1991); *Pardazi v. Cullman Medical Center*, 896 F.2d 1313, 1317 (11th Cir. 1990).

the jurisdiction of the District Court. It is well-established that this Court will rarely disturb such "findings of fact in which two other courts below have concurred." *United States v. Doe*, 465 U.S. 605, 614 (1984).[8]

The reasons why this Court should not grant certiorari to consider due process issues not reached by the Court of Appeals below are underscored by the recent decision in *Ticor Title Ins. Co. v. Brown*, __ U.S. __, 114 S. Ct. 1359, 1362 (1994). In that case, this Court dismissed a grant of certiorari to consider a similar due process challenge to a non-opt-out class as being improvidently granted because the determination of a non-constitutional question, not addressed in any of the previous proceedings in *Brown*, might have made resolution of the constitutional issue unnecessary. *Id.* at 1361-62. *A fortiori*, any grant of certiorari to consider a due process challenge would be improvident in this case, since the Court of Appeals has already determined that it was not necessary to reach these due process issues.

Petitioners' assertion that the Court of Appeals "of necessity" determined the due process issue for the Class (Petition of Sean Jones, *et al.* ("Jones Pet.") at 3, 11) is without merit. The Court of Appeals merely held that by submitting to personal jurisdiction before the District Court, these individual class members had waived any due process objections. Nothing in the Court of Appeals' opinion would preclude other class members, who did not submit to personal jurisdiction, from arguing in a subsequent action that a Rule 23(b)(1) class cannot preclude their individual damages claims (although, as discussed below, Respondent/Plaintiffs would disagree with such an argument).

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[8] *See also Rogers v. Lodge*, 458 U.S. 613, 623 (1982); *Branti v. Finkel*, 445 U.S. 507, 512 (1980); *Berenyi v. District Director, Immigration and Naturalization Service*, 385 U.S. 630, 635-36 (1967); *Graver Tank & Mfg. Co. v. Linde Air Products*, 336 U.S. 271, 275 (1949).

B. Even If The Due Process Issue Was Properly Presented, Certification Of This Rule 23(b)(1) Class Would Not Conflict With *Shutts*

Alternatively, if the due process issue had not been waived, certiorari would still be inappropriate because the certification of this class action under Rule 23(b)(1) was wholly consistent with this Court's decision in *Shutts*, which was expressly limited to class actions in which the claims are "wholly or predominantly for money damages." 472 U.S. at 811 n.3. The Petitioners' assertion that *Shutts* implicitly holds that there is a due process right for class members not subject to personal jurisdiction to opt-out of a 23(b)(1) class action, such as this, involving predominant claims for injunctive relief (*see* Petition of Mark Dusbabek, *et al.* ("Dusbabek Pet.") at 11, 12; Jones Pet. at 2, 8) is directly at odds with this Court's "wholly or predominantly" test.

As the District Court found below, "the plaintiff class' claims for structural, injunctive relief 'predominate' over its claims for damages" (*see White*, 822 F. Supp. at 1411; *White*, 836 F. Supp. at 1472). This determination flowed directly from the fact that the principle relief sought and obtained by the Class was the radically new free agency system created by the Settlement Agreement. Such a non-opt-out class action, which is not "wholly or predominantly" for money damages, does not conflict with *Shutts*.[9]

For the same reason, this case does not present any conflict with the decision in *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992), *cert. dismissed as improvidently granted*, 114 S. Ct. 1359 (1994). The Ninth Circuit in *Brown* expressly

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[9] *See, e.g., Arnold v. United Artists Theater Circuit, Inc.*, 158 F.R.D. 439, 464 (1994), *motion to reconsider or certify for interlocutory appeal denied*, (N.D. Cal. Sept. 15, 1994); *In re Jackson Lockdown/MCO cases*, 107 F.R.D. 703, 713-14 (E.D. Mich. 1985); 7B C. Wright, A. Miller & M. Kane, *Federal Practice & Procedure* § 1789, at 256 (2d ed. 1986); 1 H. Newberg & A. Conte, *Newberg on Class Actions* § 1.19, at 1-18.

recognized that the ruling in *Shutts* applied solely to "claims wholly or predominantly for money damages." *Brown*, 982 F.2d at 392. It then went on to hold that the specific 23(b)(1) class at issue before it was subject to the opt-out requirements of *Shutts* because the predominant claims at issue were for monetary relief. Indeed, since the decision in *Brown*, the Ninth Circuit has had occasion to rule that a district court did not abuse its discretion by certifying a non-opt-out damages and injunctive relief class under Rule 23(b)(1), where the claims for money damages did not predominate. *See Arata v. Nu Skin International, Inc.*, 1993 WL 321710 (9th Cir.) (opinion not reported). Where, as here, "a lawsuit (1) combines claims for monetary relief with claims for declaratory or injunctive relief, and (2) the monetary claims do not 'predominate,' . . . no additional notice or chance to opt-out is required in order to satisfy due process requirements." *Arnold v. United Artists Theater Circuit, Inc.*, 158 F.R.D. 439, 464 (1994), *motion to reconsider or certify for interlocutory appeal denied*, (N.D. Cal. Sept. 15, 1994).

The reasons why a right to opt-out for absent class members is not required by due process in the different circumstances presented by a class action in which claims for money damages are not predominant stem from the fact that the protection of the rights of individual class members is much more interdependent with the resolution of the rights of other class members in actions in which substantial injunctive relief is being sought. *See White*, 822 F. Supp. at 1412, *citing* 1 H. Newberg & A. Conte, *Newberg on Class Actions* § 1.20 (3d ed. 1992). This is particularly evident in antitrust class actions brought by professional athletes which seek substantial injunctive relief in order to create a single new, highly interdependent free agency system for all class members. It is thus not surprising that all prior antitrust class action settlements by players in professional team sports, including *Alexander v. NFL*, 1977-2 Trade Cas. (CCH) ¶61,730 (D. Minn. 1977), and *Robertson v. NBA*, 72 F.R.D. 64 (S.D.N.Y.

1976), *aff'd*, 556 F.2d 682 (2d Cir. 1977), have been non-opt-out settlements, which included both a new free agency system (through injunctive relief) and a settlement of damages claims. This long-standing and well-established principle of class action law and practice does not present any conflict with the due process requirements for class actions predominantly seeking monetary damages articulated by *Shutts*.

Petitioners' argument that they should be able to reap the substantial benefits of the new free agency system created by the injunctive relief portion of the Settlement Agreement, while retaining their right to opt-out of the damages part, would make it virtually impossible to settle 23(b)(1) class actions in which claims for injunctive relief predominate. Consider, for example, the enormous benefits received from the new free agency system by petitioner O'Neal, who increased his average yearly compensation by 180% as a free agent; Petitioner Allen, who increased his compensation by 300%; Petitioner Martin, who enjoyed a 120% increase; Petitioner Dishman, who received an 80% increase; and Petitioner Hurst, who reaped a 240% increase.[10] Due process does not require that such class members, who necessarily receive the substantial benefits of the injunctive relief provided by the Settlement Agreement, also be given the right to pick and choose whether they are willing to accept the damages part of the same settlement.

C. The Lower Courts' Approval Of The Settlement Agreement As Fair, Reasonable, And Adequate To Class Members Presents No Issue Warranting This Court's Review

Each of the Petitioners' remaining arguments for certiorari review present challenges to fact-specific determinations by

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[10] These amounts are over and above the substantial damages payments these Petitioners will receive pursuant to the Settlement Agreement, which total over $2.2 million, representing an average payment of over $125,000 to each Petitioner.

the courts below arising out of their approval of the Settlement Agreement. However, this Court has held that it will not "undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error." *Graver Tank & Mfg. Co. v. Linde Air Products*, 336 U.S. 271, 275 (1949), and cases cited therein; *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").[11] No such "obvious and exceptional" error has been identified by Petitioners.

1. Federal Rule of Civil Procedure 23(e) requires that notice of a class action settlement be provided to all members of a class. It is well settled that the mechanics of the notice process are left to the sound discretion of the district court, subject only to "the broad 'reasonableness' standards imposed by due process," and will not be upset absent a clear showing that the district court abused its discretion. *Grunin v. International House of Pancakes*, 513 F.2d 114, 121 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975); *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 354-59 (1978) (reviewing class action notice under abuse of discretion standard).

Although the Petitioners challenge the notice to the Class ordered below (*see* Dusbabek Pet. at 14-15), it is clear that these claims are frivolous. The District Court ordered notice by publication in a national newspaper, *and* individualized notice of the Settlement Agreement by direct mail to all identifiable class members. *White*, 836 F. Supp. at 1462, 1466. This Court has held that such notice by mail is the best possible type of notice under the circumstances. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 175 (1974) (where names and addresses of class members are readily ascertainable,

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[11] *See also Berenyi*, 385 U.S. at 635; *Branti*, 445 U.S. at 512 n.6; *Rogers*, 458 U.S. at 623 (1982); *Doe*, 465 U.S. 605; *NCAA v. Board of Regents*, 468 U.S. 85, 98 n.15 (1984); *Goodman v. Lukens Steel Co.* 482 U.S. 656, 665 (1987).

individual notice by mail is "clearly the best notice practicable"). Accordingly, there cannot possibly be an issue worthy of Supreme Court review in the details of the individual notice that both courts below approved.

2. Similarly, Petitioners fail to cite any cert-worthy issue arising out of the Court of Appeals' approval of the Settlement Agreement as fair, reasonable and adequate, and in the best interests of the Class (*see* Dusbabek Pet. at 18-19). To the contrary, all of the Petitioners' claims in this regard are primarily factual in nature and amount to a request for this Court to review those factual findings.

As this Court has repeatedly recognized, the determination of the fairness and adequacy of a class action settlement is principally a factual one left to the discretion of the District Court, which should not be overturned on appeal unless it constitutes a clear abuse of discretion. *See, e.g., Evans v. Jeff D.*, 475 U.S. 717, 742-43 (1986) ("we shall rely primarily on the sound discretion of the district courts to appraise the reasonableness of particular class-action settlements on a case-by-case basis, in the light of all the relevant circumstances"); *Califano v. Yamasaki*, 442 U.S. 682, 703 (1979) (reviewing class action certification under abuse of discretion standard). The reason for such deference is that only the district court is "exposed to the litigants, and their strategies, positions and proofs. He is aware of the expense and possible legal bars to success. Simply stated, he is on the firing line and can evaluate the action accordingly." *Grunin*, 513 F.2d at 123.

In this case, the District Court Judge, David S. Doty, developed a thorough knowledge and understanding of the issues involved in the Settlement Agreement through his experience in presiding over both the *White* action and a host of prior actions in which NFL player movement rules were at issue. Of particular assistance to Judge Doty was his experience in presiding over, and his familiarity with the record in, *McNeil v. NFL*, which included a three month trial which resulted in

over 8,000 pages of trial transcript and over 400 exhibits. *See White*, 836 F. Supp. at 1467 n.24.

In detailed findings of fact, set out in two lengthy and exhaustive opinions, Judge Doty found that the Settlement Agreement provided enormous benefits to the class, both in its creation of a new free agency system—which has led to unprecedented player movement and vastly higher salaries to NFL players—and in its payment of $115 million to class members for injuries arising out of Plan B and other restrictions imposed in the past by the NFL clubs.[12] *See White*, 822 F. Supp. at 1412-14, 1419. After weighing these significant benefits against the prospect of continuing with protracted and risky litigation, as well as the irreparable injury to class members that would be caused by any new set of restrictions that the NFL would likely attempt to impose, the District Court reached the well-supported conclusion that the Settlement Agreement was in the best interests of the Class. *Id.* at 1432. This was particularly true in light of the short careers of most class members, who would be long retired from the NFL before all litigation was complete. *See Jackson*, 802 F. Supp. at 231.

Moreover, the fact that (i) less than 2% of all class members ever objected to the Settlement Agreement, and (ii) the terms of the new free agency system were incorporated almost verbatim in a collective bargaining agreement approved by over 96% of the NFL players who voted on ratification, provides compelling evidence of the overwhelming support

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[12] Between March 1, 1993, when the new free agency rules went into effect, and June 23, 1993, the average salaries of NFL players who signed new contracts more than doubled, exceeding $1 million per year. *White*, 836 F. Supp. at 1479-80. In addition to such huge salary increases, there has been unprecedented player movement under the new free agency system. In 1993, and again in 1994, over 100 NFL players switched clubs as Unrestricted Free Agents. Thus, the marketplace experience under the new free agency system provides "substantial evidence that the Settlement Agreement provide[d] significant benefits to the class." *White*, 41 F.3d at 408 (citing *White*, 836 F. Supp. at 1479-83).

among class members for the Settlement Agreement. This further demonstrates why there is no cause for this Court to grant certiorari to review the lower courts' fact-based approval of the Settlement Agreement.

3. Finally, Petitioners fail to raise any cert-worthy issue in their challenge to the adequacy of class representation. As both lower courts held, "the adequacy of class representation . . . is ultimately determined by the settlement itself." *White*, 41 F.3d at 408; *White*, 822 F. Supp. at 1406.[13] Accordingly, there can be little doubt that such representation was adequate where, as here, the Class received hundreds of millions of dollars in free agency benefits and $115 million in actual damages (in addition to the other substantial benefits provided by the global litigation settlement).

Similarly, there is no reason for this Court to review the Court of Appeals' determination that the fact that "named plaintiffs received additional awards based on their efforts and risks in the case" did not render them inadequate class representatives (*White*, 41 F.3d at 408). As numerous other courts have held, such additional consideration to class representatives who gain substantial benefits for the class is often appropriate and within the sound discretion of the district court to approve. *See Luevano v. Campbell*, 93 F.R.D. 68, 69 (D.D.C. 1981) ("where there are sufficient indications that the class has been treated fairly and that the relief for the named plaintiffs is not excessive, the provision of greater monetary relief for the named plaintiffs than for class members does not warrant disapproval of the settlement").[14] There

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[13] *See also In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 212 (5th Cir. 1981); *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 152 (S.D. Ohio 1992).

[14] *See also Thornton v. East Texas Motor Freight*, 497 F.2d 416, 470 (6th Cir. 1974) ; *Enterprise Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240, 250 (S.D. Ohio 1991); *In re Jackson Lockdown/MCO Cases*, 107 F.R.D. at 710; *Huguley v. General Motors Corp.*, 128 F.R.D. 81, 85 (E.D. Mich. 1989) *aff'd*, 925 F.2d 1464 (6th

was more than an adequate record to support the lower courts' determinations that the class representatives here—who risked retaliation from the NFL to obtain the substantial relief granted to the Class—deserved the limited additional benefits that were provided.

CONCLUSION

For the foregoing reasons, Petitioners have failed to raise any issues that warrant this Court's review and their Petitions for Certiorari should be denied.

Dated: May 22, 1995

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Cir.), *cert. denied*, 502 U.S. 909 (1991); *Lo Re v. Chase Manhattan Corp.*, 19 Fed. Empl. Prac. Cas. (BNA) 1366, 1369 (S.D.N.Y. 1979); *League of Martin v. City of Milwaukee*, 588 F. Supp. 1004, 1020 (E.D. Wis. 1984); *Women's Committee v. National Broadcasting Co.*, 76 F.R.D. 173, 180 (S.D.N.Y. 1977).

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MAY 22 1995

Nos. 94-1749 & 94-1750

In the

Supreme Court of the United States

OCTOBER TERM, 1994

SEAN JONES, *et al.*,

Petitioners,

v.

REGGIE WHITE, *et al.*,

Respondents,

MARK DUSBABEK, *et al.*,

Petitioners,

v.

REGGIE WHITE, *et al.*,

Respondents.

PETITIONS FOR WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF AMICUS CURIAE OF PUBLIC CITIZEN INC. IN SUPPORT OF CERTIORARI

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v.

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REGGIE WHITE, *et al.*,

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MOTION OF PUBLIC CITIZEN, INC. FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF CERTIORARI

Pursuant to Rule 37.2 of this Court, Public Citizen, Inc. hereby moves for leave to file the accompanying brief *amicus curiae* in support of these petitions. Both sets of petitioners have consented, as has the respondent National Football League and its member organizations. However, counsel for Reggie White and the plaintiff class has refused consent on the ground that the issue addressed in the accompanying brief is not properly presented as a result of the decision of the Eighth Circuit below.

Public Citizen is a nonprofit consumer organization, with approximately 88,000 members nationwide. Through its

Litigation Group, it has participated in a substantial number of class actions seeking money damages, generally, but not always, appearing on behalf of absent class members, such as the petitioners in these two cases. It filed briefs *amicus curiae* in this Court in the two central cases bearing on the issue presented by these petitions: *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), and *Ticor Title Ins. Co. v. Brown*, 114 S. Ct. 1359 (1994), in both cases urging the Court to analyze the issue using the Due Process test set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976). This brief will also take that approach, which is not suggested in either petition, although it was the principal focus of the briefing, but not the ultimate decision, in *Ticor*. In addition, this brief suggests an interim position, not proposed by any of the existing parties, with respect to the central issue of class certification. It urges that the claims for injunctive relief can be certified on a non-opt out basis, but that the claims for money damages can be certified only by allowing an opt out. It is because none of the existing parties is urging either of these positions that Public Citizen is filing this brief.

For the foregoing reasons, the motion for leave to file should be granted.

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May 22, 1995

ALTERNATIVE QUESTION PRESENTED

The following question is a combination and modification of questions 1, 2 and 9 in the petition in 94-1749 and questions 1 and 2 in 94-1750. *Amicus* believes that its question more precisely states the issue than does those questions. With respect to the other questions in the petitions, *amicus* believes that they are fairly comprised within the rephrased question, or, with respect to question 8 in 94-1749 and question 3 in 94-1950, do not warrant review.

In a federal antitrust action involving claims for both injunctive relief and individual claims for substantial money damages, may a federal court, consistent with Rule 23 and the Due Process Clause, certify a class and approve a settlement in which the individuals are not afforded a right to opt out on their claims for money damages?

TABLE OF CONTENTS

ALTERNATIVE QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF AMICUS 1

BRIEF OF AMICUS CURIAE 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 8

CONCLUSION 16

TABLE OF AUTHORITIES

CASES **PAGE**

In re A.H. Robins Co., Inc., 880 F.2d 709 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989) 9, 10

Brown v. Pro Football, Inc., 782 F. Supp. 125 (D.D.C. 1991), *reversed*, 1995 WL 115729 (D.C. Cir.) 6, 11

Brown v. Ticor Title Insurance Co., 982 F.2d 386 (9th Cir. 1992) . . . . . *passim*

In re Dennis Greenman Securities Litig., 829 F.2d 1539 (11th Cir. 1987) 10

Eisen v. Carlilse & Jacquelin, 417 U.S. 156 (1974) . . 11

Hansberry v. Lee, 311 U.S. 32 (1940) 13

Mathews v. Eldridge, 424 U.S. 319 (1976) 2, 14

McDonnell Douglas Corp. v. United States District Court for the Central District of Calif., 523 F.2d 1083 (9th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976) 10

McNeil v. NFL, 1992-2 Trade Cas. (CCH ¶ 69,682)(D. Minn. 1992) 4, 7

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 13

Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) . . . . . *passim*

Ticor Title Ins. Co. v. Brown, 114 S. Ct. 1359 (1994) 2, 8

MISCELLANEOUS

Federal Rules of Civil Procedure
23 . . . . . 2, 5, 9, 10, 11, 13
23(b)(1) 4, 5, 8, 10, 12, 13
23(b)(1)(A) 4, 5, 10, 14
23(b)(2) 5, 8, 12, 14
23(b)(3) 5, 10, 11, 12, 13, 15
23(c) 12
23(c)(2) 10, 11, 12
23(c)(2)(C) 11

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BRIEF AMICUS CURIAE OF PUBLIC CITIZEN INC. IN SUPPORT OF CERTIORARI

INTEREST OF AMICUS

Public Citizen, Inc. is a nonprofit consumer organization, with approximately 88,000 members nationwide. Through its Litigation Group, it has participated in a substantial number of class actions seeking money damages, generally, but not always, appearing on behalf of absent class members, such as the petitioners in these two

cases. It filed briefs *amicus curiae* in this Court in the two central cases bearing on the issue presented by the petitions: *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), and *Ticor Title Ins. Co. v. Brown*, 114 S. Ct. 1359 (1994), in both cases urging the Court to analyze the issue using the Due Process test set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976). This brief will also take that approach, which is not suggested in either petition, although it was the principal focus of the briefing, but not the ultimate decision, in *Ticor*. In addition, this brief suggests an interim position, not proposed by any of the existing parties, with respect to the central issue of class certification. It urges that the claims for injunctive relief can be certified on a non-opt out basis, but that the claims for money damages can be certified only by allowing an opt out. It is because none of the existing parties is urging either of these positions that Public Citizen is filing this brief.

STATEMENT OF THE CASE

The fundamental issue raised by these petitions is how federal courts should reconcile the interests of individual class members and the class as a whole when a class complaint seeks both injunctive relief and substantial money damages. In particular, the issue, which has engendered considerable confusion in the lower courts, is whether a right to opt out must be accorded where both injunctive relief and substantial money damages are sought.

There are two polar positions, which we reject, and a middle ground which we support. On one end of the spectrum is the position adopted by the district court: in cases seeking "predominately" injunctive relief, there is no right to opt out. On the other end is the position that, if there are substantial claims for money damages, the class members must be given an opt out as to all claims. Our position is in the middle: there need be no opt out for the injunctive relief claims, but Rule 23 and the Due Process

Clause require an opt out for substantial individual claims for money damages. Before explaining how we arrive at that result and why review is warranted, it is necessary to highlight certain facts regarding these proceedings that are not fully set forth in the petitions.

After a series of antitrust actions against the respondent National Football League ("NFL") by present and former players were filed, and in some cases tried, this action was filed in the District of Minnesota on September 21, 1992, as a class action, initially seeking only injunctive relief. The basic claim was that certain NFL practices regarding player contracts—restrictions on players moving from one club to another (known as Plan B), the college draft, the standard NFL player contract, and the pre-season pay rules—violated the federal antitrust laws. The complaint sought an order directing the NFL to restructure its rules so as not to violate those laws. Thereafter, the complaint was amended to add a separate class claim for money damages, which are trebled under the antitrust laws.

In early 1993, a settlement was reached on the injunctive and damages claims, both on a class-wide basis, with certain limited exceptions described below. The class included all current and former NFL players (back to August 31, 1987), as well as all future college players who might seek to play in the NFL. Since the agreement essentially rewrote the rules governing the relationship between the NFL and the players—present, past,and future— the named parties insisted, and we agree (although petitioners may not), that the injunctive class had to include everyone, with no right to opt out: there had to be one set of rules for everyone if there was to be a contract at all between the NFL and the players.

As part of the settlement, the League naturally wanted to resolve all of the pending claims for money damages against it, as well as any other claims that might be brought thereafter relating to its prior rules. Thus, the class was defined to include all former, present, and future NFL

players who had any claims dating from August 31, 1987, to the date of the final approval of the settlement. Although all present and future players would be bound by the structural changes, there was less than complete identity between those class members governed by the injunctive relief and those who were theoretically eligible to sue for damages.

First, college athletes, who had yet to seek to play in the NFL, plainly had no claim for damages for conduct occurring while they were still in college. Second, some of the players who had damages claims were no longer in the League, and hence the new rules on player contracts, as well as benefits, such as injury protection, worker's compensation, and moving and travel expenses, would be irrelevant to them. Third, there were certain key dates, the most significant being November 6, 1989, when the National Football League Players Association ("NFLPA") ceased being the certified bargaining agent of the players, after which the NFL's antitrust defenses based on the prior collective bargaining agreement were seriously weakened. Fourth, some of those current players who were eligible to file damages claims might have unique defenses applicable to them, such that they might benefit only from the injunctive relief, or they might have varying degrees of difficulty in proving money damages.[1]

Despite these differences in class composition, the court nonetheless certified a single class, with no subclasses, under the mandatory provisions of Federal Rule of Civil Procedure 23(b)(1). In doing so, it relied principally on subpart (A) of that Rule, which provides for non-opt out classes where "the prosecution of separate actions by or against individual

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[1]For example, in *McNeil v. NFL*, 1992-2 Trade Cas. (CCH ¶ 69,682)(D. Minn. 1992), the jury found that the NFL had violated the antitrust laws, but four players were awarded *no* damages, and four others were awarded damages ranging from $50,000 to $240,000, before trebling. Pet. App. 183, n.14.

members of the class would create a risk of . . . inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class ... ." There is no question that "inconsistent or varying adjudications" (or settlements) concerning the rules establishing the relationships between players and the League over contract matters would be possible, perhaps even likely, if class members were entitled to opt out and litigate the claims for structural relief on an individual basis. Thus, there is no legitimate basis for challenging the non-opt out class certification on that aspect of the case.

But petitioners also objected to the denial of an opt out for their individual claims for money damages. The district court recognized that the class could also have been certified under Rule 23(b)(3), which contains an absolute right to opt out for each class member, but ruled that, where both (b)(1) and (b)(3) certifications are available, the proper course to follow is to certify the class under (b)(1). Pet. App. 216-17. *Amicus* agrees that claims for injunctive relief, particularly such as those seeking the kind of structural relief accorded here, which essentially rewrote the basic contractual relationship between the players and the League, are not required either by Rule 23 or Due Process to allow class members to opt out.

Although we agree that the district court properly certified the injunctive aspects of this case under Rule 23(b)(1), and could also have relied on Rule 23(b)(2), neither provision has anything to do with substantial damages claims, such as those alleged by petitioners here. Damages claims plainly do not meet the requirements of subsection (b)(1)(A) since, even if they yielded "inconsistent or varying adjudications," they do not create "incompatible standards of conduct" for the defendant, except that some claimants receive compensation and others do not. Nonetheless, as a result of the district court's decision to certify both injunctive claims and damages claims under Rule 23(b)(1), petitioners

were denied their right to opt out and instead were forced to accept the formula for damages provided in the settlement agreement, even though they believed that could obtain more money, either in settlement or after trial, in their own antitrust cases which were already pending in other courts for all but two of the petitioners.

One other aspect of the settlement bears noting in connection with the claim by the settling parties that opt outs could not be permitted for damages claims. The agreement itself contained a formula for the payment of damages to class members based on the effects of Plan B on them, and a pool of money to be divided among those who claimed injuries based on price fixing for pre-season pay. However, the agreement also creates a series of exceptions, both for the named plaintiffs in this litigation and the named parties in some other cases against the NFL—those supported by the Players Association—but not those which these petitioners had filed. Pet. App. 231-34. Those exceptions created entirely separate payment plans for their beneficiaries that were far more generous than the basic settlement. While that does not prove that they are improper, it does make clear that any claimed need for an all-inclusive settlement, with a single payment plan, is insupportable.

Even more damning is the exclusion, from any agreement on damages, of the entire case of *Brown v. Pro Football, Inc.*, 782 F. Supp. 125 (D.D.C. 1991), which had been tried and was then on appeal to the District of Columbia Circuit and was just recently reversed. 1995 WL 115729 (D.C. Cir.). If that case could be excluded from a global settlement, there was no reason in principle why those cases in which petitioners were involved, or other cases that might be filed by others who would have liked to have opted out, could not have been allowed to go forward on their own,

either to judgment or settlement, instead of being bound by the formula in the settlement agreement.[2]

Despite all of these differences among class members, the district court certified a single class and then precluded any class member from opting out. Petitioners' appeal to the Eighth Circuit focussed on the lack of an opt out, but also argued that the settlement was not fair, especially with respect to the disparities between damages for class members under the formula and damages awarded the named plaintiffs in this and other specially-favored cases. Although we agree with petitioners that neither court below gave sufficient consideration to the issue of unfairness, allowing an opt out would provide an essential safety valve to help assure that named plaintiffs do not receive amounts greatly in excess of those accorded the rest of the class, since if they do, others will opt out and try for the same bargain.

The Eight Circuit affirmed, in a brief opinion which never addressed the opt out issue. The court of appeals took the position that an opt out was necessary solely to deal with the problem of personal jurisdiction over out-of-state class

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[2]In addition to the disparity in damages awarded by the jury in *McNeil*, *supra*, note 1, the settlement agreement recognized that all players are not in equal bargaining positions and do not command equal wages. Thus, the agreement establishes categories of franchise and transition players who may be specially protected in the future, but only if they are paid, respectively, within the top 5 and top 10 players at their positions, which themselves are divided into eleven categories, with distinctions made between cornerbacks and safeties, and between defensive ends and defensive interior linemen, not to mention broader differences between offense and defense and linemen and backs. Settlement Agt. § VIII 7. Unlike those categories governing future situations, the payment formula for past damages treated all players, except those expressly excluded because they were parties to certain prior lawsuits, on the same basis, regardless of the position they played or their skill, based on prior salary or other measurement.

members. Since it found that petitioners either were subject to personal jurisdiction or had voluntarily entered the action, and hence waived any jurisdictional objection which might trigger an opt out, it believed that it did not need to reach the question of the effect of *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), in a case involving claims for both damages and injunctive relief.[3]

REASONS FOR GRANTING THE WRIT

1. As both petitions make clear, the decision of the district court refusing to allow class members with individual claims for money damages to opt out those claims is directly contrary to the ruling of the Ninth Circuit in *Brown v. Ticor Title Insurance Co.*, 982 F.2d 386 (1992). Since this Court granted review in *Ticor* to resolve the very issue presented here, but ultimately dismissed the petition as improvidently granted, over the dissents of three justices, 114 S. Ct 1359, 1362 (1994), and since the Court has not yet resolved that issue, review is plainly warranted.

If there were any question that the issues presented in both cases are the same, the brief *amicus curiae* filed by the NFL in *Ticor* contained a short summary of argument on page 3 removing any such doubt:

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[3]Because both petitions demonstrate the error in this approach by the court of appeals, we address it only briefly. *Shutts* was not simply a case about the limits of the reach of state courts, but dealt more generally with the issue of when persons who were not named parties could be bound, as part of a class, in an action seeking money damages. Thus, we read *Shutts* as requiring the same notice and opt out rights for all non-parties, even those who reside in the forum state, in order to satisfy Due Process. For that reason, as well as those stated in the petitions, the attempt by the Eighth Circuit to avoid confronting the impact of *Shutts* in this case was unavailing.

> The history of the NFL's labor dispute with its players that culminated in the class action settlement in *White*, together with the procedural safeguards employed therein to protect the interests of absent class members, demonstrates that the Ninth Circuit's decision is overbroad and incorrect. The decision below: (i) adopts unwarranted and unprecedented new standards of due process where claims for injunctive relief predominate over claims for monetary relief; (ii) if affirmed, would render unconstitutional all mandatory federal class actions involving damage claims, thereby invalidating Federal Rules 23(b)(1) and (b)(2) in a large number of cases; and (iii) severely undermines the practical utility and policy goals of the Rule 23 mechanism. Accordingly, the Ninth Circuit's decision should be reversed.[4]

In addition to the cases cited by petitioners, the conflict among the circuits is deepened by the Fourth Circuit's decision in *In re A.H. Robins Co., Inc.*, 880 F.2d 709, in which this Court denied certiorari, with Justice White dissenting, 493 U.S. 959 (1989). Like this case, the claims

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[4]We recognize that the NFL's *amicus* brief in *Ticor* (p. 11 n.7) argued that the two cases were distinguishable because no money was paid to class members in *Ticor*, whereas class members in this case received substantial payments, although less than petitioners believe they are entitled to receive. We admit the factual distinction, but fail to understand its relevance on the issue of whether members of either class had a right to opt out under Rule 23 or the Due Process Clause. Indeed, if anything, the lack of any payment in *Ticor* suggests that the case was only about injunctive relief, whereas there is no question here that the claims for money damages are substantial, measured both by the dollars at stake and the reasonable likelihood of success.

for money damages at issue in *Robins* had been certified as a class action under Rule 23(b)(1), with no right of opt out. While there are a number of factual and perhaps legal differences between that case and this, the opinion in *Robins* further evidences the confusion among the lower courts about the circumstances, if any, under which there may be a non-opt out class action involving claims for substantial money damages.

Finally, we note that other courts, particularly the Eleventh Circuit and the Ninth Circuit (consistent with its later expressed view in *Ticor*), have held, in direct contrast to the district court's reasoning here, that an expansive view of Rule 23(b)(1) in damage cases is an impermissible encroachment on the rights provided by Rules 23(b)(3) and (c)(2). *See, e.g., In re Dennis Greenman Securities Litig.*, 829 F.2d 1539, 1545 (11th Cir. 1987) (citing other cases, and noting "that if compensatory damage actions can be certified under Rule 23(b)(1)(A), then all actions could be certified under that section, thereby making the other subsections of the Rule meaningless, particularly Rule 23(b)(3)"); *McDonnell Douglas Corp. v. United States District Court for the Central District of Calif.*, 523 F.2d 1083, 1086 (9th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976).

2. Beyond the conflict in the circuits, review should be granted because the question presented is of special importance and the decision to deny petitioners the right to opt out violated Rule 23 and the Due Process Clause. Moreover, the decision to deny any opt outs was unnecessary to achieve the legitimate goal of assuring that the newly negotiated NFL rules governing terms and conditions applicable to player contracts would apply to everyone.[5]

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[5]To the extent that petitioners argue that Due Process requires that they be entitled to opt out of the claims for injunctive relief, (continued...)

There are several means by which the district court and the parties here could have protected the rights of petitioners, consistent with Rule 23 and Due Process. First, two classes could have been certified: one for damages and the other for injunctive relief, with only the latter being mandatory. Second, one class could have been certified, but class members allowed to opt out solely with respect to their damages claims. Third, there could have been a class only for injunctive relief, and the damages claims could have proceeded in independent lawsuits, as apparently was intended when the case was filed, since, as noted above, the original complaint did not include a claim for money damages. What could not take place was what happened here: class members with damages claims were forced to

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[5](...continued)
we disagree. However, we do agree that, especially because of the absence of an opt out, district courts must follow the mandate of Rule 23(c)(2)(C) and the Advisory Committee Notes to the 1966 Amendments to Rule 24, and allow class members to intervene and to take reasonable discovery to enable them to make their objections meaningful. Moreover, where there is no opt out, the courts must review proposed settlements with great care precisely because they bind all members of the class, in this case, all past, present, and future NFL players. Contrary to the suggestion made by the NFL in its *amicus* brief in *Ticor* (at 24 n. 20), extensive findings by the district court, adequate representation by class counsel, notice, an opportunity to be heard, and a fairness hearing are not "the functional equivalent of those [safeguards] provided by the opt-out provisions of Rule 23(b)(3)." *See Eisen v. Carlilse & Jacquelin*, 417 U.S. 156, 176-77 (1974) (finding of adequacy of representation not a surrogate for notice and opt-out rights under Rule 23); *cf. In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 1995 WL 223209 (3d Cir.) (fairness determination may not serve as surrogate for Rule 23 class certification findings). If they were equivalent, there would be no need for Rule 23(c)(2) to grant an express right to opt out, applicable only to classes certified under Rule 23(b)(3).

accept the terms negotiated by class counsel, with no right to negotiate or litigate on their own.

This result is first compelled by Rule 23. The drafters of the Rule made clear that, for individual claims for money damages, such as those at issue here, the right of opt out must be given. Surely, the mandatory notice and opt out rights in Rule 23(c)(2) cannot be avoided simply by relabelling a (b)(3) class as one under (b)(1) or (b)(2). Yet that is the impact of the ruling by the district court: the protections of Rule 23(c) can be overridden by use of Rule 23(b)(1). As noted above, we do not believe that claims for damages, as opposed to those seeking injunctive relief, can be brought under subdivision 1 since the problem to which that provision is addressed—situations where inconsistent verdicts leave the party opposing the class with conflicting primary obligations to class members—is simply not a problem when the relief sought is a judgment for money damages.

Nor do we agree with the district court that it is relevant whether the claims for injunctive relief "predominate" over those for damages for several reasons. Pet. App. 219-21. First, Rule 23(b)(3), not Rule 23(b)(1), uses the word predominate, and thus the concept of predominance has no place in the analysis of the scope of subsection (b)(1). Second, we doubt that predominance can be accurately measured, or that it is even a useful concept, in cases where there are substantial claims for both money damages and injunctive relief. The problem is greatly magnified in this case because, as noted above, there are class members, such as former players, who have no interest in injunctive relief and are seeking only money damages, and others, such as those who are still in college, who are not even eligible for monetary relief. Thus, even if the concept of "predominance" were a meaningful one in some situations, it seems clear that the predominance calculation here is not a unitary one for the class as a whole, but varies with each individual class member. Finally, to assume that

all claims could be properly certified under Rule 23(b)(1), would necessarily mean that the drafters of Rule 23 would have been willing to permit the denial of the right to opt out, after having insisted on it for all damages class actions brought under Rule 23(b)(3). That assumption is a very difficult one to accept, especially in light of the Due Process problems that such a construction of the Rules would raise, the issue to which we now turn.

The fundamental rule of law, embodied in the prohibition against deprivation of property without Due Process, is that no person may be deprived of a claim against another without a day in court. That is the message of the seminal case of *Hansberry v. Lee*, 311 U.S. 32 (1940), and that is the basis on which this Court had to examine the claims of the defendant in *Phillips Petroleum v. Shutts*, 472 U.S. 797 (1985), that Due Process prohibited a nationwide class from being maintained in state court.

There is, of course, an exception to the requirement that a person must be a party to a lawsuit before his or her rights can be affected where that person is part of a valid class. *Hansberry* teaches that adequate representation is a prerequisite, and *Shutts* teaches that at least adequate notice is also required. *See also Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). The question that remains is, when is the right to opt out an essential element of Due Process? While we believe that *Shutts* strongly suggests an opt out is required whenever a class member has substantial claims for money damages, we do not contend that *Shutts* absolutely decided that issue, at least as applied to the facts of this case.

In *Shutts*, the defendant argued that the Due Process rights of out-of-state class members were violated by a nationwide class, but this Court rejected that claim, as applied to that class, where notice had been given by first class mail to each class member, the certified class excluded those to whom the notice could not be delivered, and each

class member was given the right to opt out. 472 U.S. at 801. Although there is language in the opinion from which it can be argued that the Court decided that an opt-out right is always required where there are claims for money damages, *id.* at 812, that was not the holding of *Shutts* since there a right to opt out had been granted.

In our view, the answer to the Due Process question presented here must be derived by looking to the three-part test established in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), for determining what process is due. As we spelled out in our *amicus* briefs in *Shutts* and *Ticor*, applying that test leaves no doubt that Due Process requires that individual claims for money damages of the kind possessed by petitioners here cannot be resolved by settlement of a class action or otherwise, unless the claimants are given the opportunity to litigate those claims with attorneys of their choosing, in a forum of their choosing.

The question of whether to apply the *Mathews* test, as both Public Citizen and the petitioners urged in *Ticor*, and how to apply that test in this context, are important questions which this Court should decide. Thus, in addition to the reasons offered in the petitions, the application of the *Mathews* test provides a further basis for granting review.

The question presented by the petitions, as restated in this brief, is by no means limited to the antitrust context. Indeed, the most likely area where the issue will be litigated is under Title VII of the Civil Rights Act of 1964, in particular the 1991 amendments to it. Prior to the amendments, only back pay was available for violations of Title VII, but now compensatory damages and a right to a jury trial have been added. Whereas formerly most employment discrimination cases were certified solely under Rule 23(b)(2), or perhaps under Rule 23(b)(1)(A), the availability of individual damages under Title VII now raises the issue of whether that past practice may continue, at least

without affording individual claimants a right to opt out on their damages claims.

Indeed, in *Ticor,* the Lawyers' Committee for Civil Rights under Law filed an *amicus* brief on this very question. It argued that Rule 23(b)(3) was not the only way to deal with cases in which there are claims for both injunctive and monetary relief, but conceded that cases that seek both injunctive relief and substantial damages under the civil rights laws would have to allow class members to opt out with respect to their damages claims. Brief at 19-20. Although cases of this kind under Title VII are just starting to move through the courts, a ruling in this case could provide much useful guidance, if not a definitive answer, to the question of how those cases should be handled.

Similar issues arise in the securities field, although perhaps with less frequency than in employment cases, since most securities claims seek money damages only, or at least primarily. Nonetheless, a ruling here would provide assistance to courts facing the problem in that context, and perhaps in others as well. Finally, as illustrated by *Shutts*, most states have provisions similar to Rule 23, and in any event are bound by the Due Process Clause. Therefore, a decision in this case would also be helpful to state courts in their handling of class actions.

CONCLUSION

For the foregoing reasons, and those set forth in the petitions, writs of certiorari should be granted in both cases, limited to the question as set forth in this brief.

Respectfully submitted,

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Nos. 94-1749, 94-1750

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

SEAN JONES, ET AL.,
Petitioners,

v.

REGGIE WHITE, ET AL. AND
NATIONAL FOOTBALL LEAGUE, ET AL.,
Respondents.

MARK DUSBABEK, ET AL.,
Petitioners,

v.

REGGIE WHITE, ET AL. AND
NATIONAL FOOTBALL LEAGUE, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether this Court should exercise its certiorari jurisdiction to review questions that the court below expressly declined to consider or decide.

2. Whether, in a class action properly certified under Federal Rule of Civil Procedure 23(b)(1) and involving claims predominantly for injunctive relief, class members who are subject to the class action court's personal jurisdiction have an absolute right to opt out of the class.

3. Whether, in a class action involving claims predominantly for injunctive relief, the presence of claims for monetary damages precludes class certification under Federal Rules of Civil Procedure 23(b)(1) and/or (b)(2).

PARTIES TO THE PROCEEDING

The National Football League (the "NFL" or the "League") and 28 of its member clubs are Respondents in this proceeding (the "NFL Respondents").* The NFL Respondents were the defendants in the proceedings before the United States District Court for the District of Minnesota and were appellees before the United States Court of Appeals for the Eighth Circuit.

NFL players Reggie White, Michael Buck, Hardy Nickerson, Vann McElroy, and Dave Duerson, on behalf of the *White* class, are Respondents in this proceeding (the "Player Respondents"). The Player Respondents were the plaintiffs and the class representatives in the proceedings before the United States District Court for the District of Minnesota and were appellees before the United States Court of Appeals for the Eighth Circuit.

NFL players Sean Jones, Leslie O'Neal, Eric Allen, Cris Dishman, William Mathews, and Van Waiters are Petitioners in this proceeding (the "Jones Petitioners"). The Jones Petitioners were class members/objectors/plaintiffs-in-intervention in the proceedings before the United States District Court for the District of Minnesota and were appellants before the United States Court of Appeals for the Eighth Circuit.

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* The member clubs of the NFL who are Respondents in this proceeding are: The Five Smiths, Inc.; Buffalo Bills, Inc.; Chicago Bears Football Club, Inc.; Cincinnati Bengals, Inc.; Cleveland Browns, Inc.; The Dallas Cowboys Football Club, Ltd.; PDB Sports, Ltd.; The Detroit Lions, Inc.; The Green Bay Packers, Inc.; Houston Oilers, Inc.; Indianapolis Colts, Inc.; Kansas City Chiefs Football Club, Inc.; The Los Angeles Raiders, Ltd.; The Los Angeles Rams Football Company, Inc.; Miami Dolphins, Ltd.; Minnesota Vikings Football Club, Inc.; KMS Patriots, L.P.; The New Orleans Saints Limited Partnership; The New York Football Giants, Inc.; New York Jets Football Club, Inc.; The Philadelphia Eagles Football Club, Inc.; B&B Holdings, Inc.; Pittsburgh Steelers Sports, Inc.; Chargers Football Co.; Seattle Seahawks, Inc.; Tampa Bay Area NFL Football Club, Inc.; and Pro-Football, Inc.

NFL players Mark Dusbabek, Carl Lee, Audray McMillian, Felix Wright, Cody Risien, Mark Harper, Sammy Martin, Don Beebe, Gregory Scales, Maurice Hurst, John Fourcade, and Byron Evans are Petitioners in this proceeding (the "Dusbabek Petitioners"). The Dusbabek Petitioners were class members/objectors/plaintiffs-in-intervention in the proceedings before the United States District Court for the District of Minnesota and were appellants before the United States Court of Appeals for the Eighth Circuit.

TABLE OF CONTENTS

PAGE

COUNTERSTATEMENT OF QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

COUNTERSTATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 8

I. THE EIGHTH CIRCUIT EXPRESSLY DECLINED TO REACH THE PRIMARY QUESTIONS RAISED BY PETITIONERS 8

II. THE RESULT REACHED BY THE EIGHTH CIRCUIT IS FULLY CONSISTENT WITH THIS COURT'S PRECEDENT AND WOULD NOT HAVE BEEN DIFFERENT IN OTHER CIRCUITS 9

A. There Is No Conflict with this Court's Decision in *Phillips Petroleum Co. v. Shutts*. 10

1. No *Shutts* Issue Is Presented Because the Objectors Consented to the District Court's Jurisdiction. 10

PAGE

2. In Any Event, *Shutts* Would Not Require an Opt-Out Right in this Case Because it Involves Claims Predominantly for Injunctive Relief 15

B. For the Same Reasons that No *Shutts* Issue Is Presented, the Eighth Circuit's Decision Does Not Conflict with Ninth Circuit Authority 16

III. RULES 23(b)(1) AND 23(b)(2) WERE NOT INTENDED, AND HAVE NEVER BEEN CONSTRUED, TO PRECLUDE CERTIFICATION OF MANDATORY CLASSES WHERE CLAIMS FOR MONETARY RELIEF ARE INVOLVED 19

CONCLUSION 23

TABLE OF AUTHORITIES

CASES	PAGE(S)
Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975)	20
Arata v. Nu Skin International, Inc., No. 92-15380, 1993 U.S. App. LEXIS 21747 (9th Cir. July 14, 1993)	18, 20n
Arnold v. United Artists Theatre Circuit, Inc., 158 F.R.D. 439 (N.D. Cal. 1994)	18
Battle v. Liberty National Life Insurance Co., 770 F. Supp. 1499 (N.D. Ala. 1991), *aff'd*, 974 F.2d 1279 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 2999 (1993)	13n
Besinga v. United States, 923 F.2d 133 (9th Cir. 1991)	12
Brown v. Ticor Title Insurance Co., 982 F.2d 386 (9th Cir. 1992), *cert. dismissed*, 114 S. Ct. 1359 (1994)	*passim*
Burnham v. Superior Court, 495 U.S. 604 (1990)	22
Califano v. Yamasaki, 442 U.S. 682 (1979)	20
California v. Taylor, 353 U.S. 553 (1957)	9
Dosier v. Miami Valley Broadcasting Corp., 656 F.2d 1295 (9th Cir. 1981)	20n
In re Drexel Burnham Lambert Group, Inc., 960 F.2d 285 (2d Cir. 1992), *cert. dismissed*, 113 S. Ct. 1070 (1993)	12
Duignan v. United States, 274 U.S. 195 (1927)	9
EEOC v. General Telephone Co., 599 F.2d 322 (9th Cir.), *aff'd on other grounds*, 446 U.S. 318 (1980)	21n
Edgerton v. Armour & Co., 94 F. Supp. 549 (S.D. Cal. 1950)	21n

CASES **PAGE(S)**

Elliott v. Weinberger, 564 F.2d 1219 (9th Cir. 1977), *aff'd sub nom. Califano v. Yamasaki*, 442 U.S. 682 (1979) 21n

Goodman v. Lukens Steel Co., 482 U.S. 656 (1987) 14

Grimes v. Vitalink Communications Corp., 17 F.3d 1553 (3d Cir.), *cert. denied*, 115 S. Ct. 480 (1994) 12

Howard v. McLucas, 782 F.2d 956 (11th Cir. 1986) 20n

In re Jackson Lockdown/MCO Cases, 107 F.R.D. 703 (E.D. Mich. 1985) 13n

King v. South Central Bell Telephone & Telegraph Co., 790 F.2d 524 (6th Cir. 1986) 20n

Larionoff v. United States, 533 F.2d 1167 (D.C. Cir. 1976), *aff'd*, 431 U.S. 864 (1977) 20n

McNeil v. NFL, 1992-2 Trade Cas. (CCH) ¶ 69,982 (D. Minn. 1992) 3

Mitchell v. Los Angeles Unified School District, 963 F.2d 258 (9th Cir.), *cert. denied*, 113 S. Ct. 375 (1992) . . 12

NCAA v. Board of Regents, 468 U.S. 85 (1984) 14

Nottingham Partners v. Trans-Lux Corp., 925 F.2d 29 (1st Cir. 1991) 20n

Patrick v. Burget, 486 U.S. 92 (1988) 9

Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) . *passim*

Powell v. NFL, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991) 2

Powell v. NFL, 711 F. Supp. 959 (D. Minn. 1989) 2

CASES **PAGE(S)**

Probe v. State Teachers' Retirement System, 780 F.2d 776 (9th Cir.), *cert. denied*, 476 U.S. 1170 (1986) . . . 20nn

Ramsey v. United Mine Workers, 401 U.S. 302 (1971) 9

In re Real Estate Title & Settlement Services Antitrust Litigation, 869 F.2d 760 (3d Cir.), *cert. denied*, 493 U.S. 821 (1989) 14

Reynolds v. NFL, 584 F.2d 280 (8th Cir. 1978) 20n

Rich v. Martin Marietta Corp., 522 F.2d 333 (10th Cir. 1975) 20n

Robertson v. NBA, 556 F.2d 682 (2d Cir. 1977) 20n

Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971) 20n

Rodgers v. Lodge, 458 U.S. 613 (1982) 14

Saunders v. Naval Air Rework Facility, 608 F.2d 1308 (9th Cir. 1979) 20-21n

Silber v. Mabon, 18 F.3d 1449 (9th Cir. 1994) 12

Taylor v. Freeland & Kronz, 503 U.S. 638 (1992) 9

Ticor Title Insurance Co. v. Brown, 114 S. Ct. 1359 (1994) 15n, 17n, 19n

Ticor Title Insurance Co. v. Brown, 114 S. Ct. 56 (1993) . 17n

Waldron v. Raymark Industries, Inc., 124 F.R.D. 235 (N.D. Ga. 1989) 13n

Walsh v. Great Atlantic & Pacific Tea Co., 726 F.2d 956 (3d Cir. 1983) 20n

White v. NFL, 41 F.3d 402 (8th Cir. 1994) . . . . . *passim*

CASES **PAGE(S)**

White v. NFL, 836 F. Supp. 1458 (D. Minn. 1993) . . . *passim*

White v. NFL, 822 F. Supp. 1389 (D. Minn. 1993) . . . *passim*

Whitson v. Heilig-Meyers Furniture, Inc., No. 94-PT-0309-E, 1995 U.S. Dist. LEXIS 4312 (N.D. Ala. Feb. 9, 1995) 13n

Williams v. Burlington Northern, Inc., 832 F.2d 100 (7th Cir. 1987), *cert. denied*, 485 U.S. 991 (1988) 20n

York v. Guaranty Trust Co., 143 F.2d 503 (2d Cir. 1944), *rev'd on other grounds*, 326 U.S. 99 (1945) 21n

Youakim v. Miller, 425 U.S. 231 (1976) 9

Zahn v. Transamerica Corp., 162 F.2d 36 (3d Cir. 1947) . . 21n

OTHER AUTHORITIES **PAGE(S)**

Amendments to Rules of Civil Procedure, Advisory Committee's Notes to Rule 23, 39 F.R.D. 69 (1966) . 21, 22

Fed. R. Civ. P. 23 . . . . . *passim*

IN THE
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SEAN JONES, et al.,

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 41 F.3d 402 (8th Cir. 1994) ("*White III*") and is reprinted in Petitioners' Appendix at 2-17. The decision of the District Court granting final approval to the settlement agreement, as amended, and the Final Consent Judgment entered in accordance therewith are reported at 836 F. Supp. 1458 (D. Minn. 1993) ("*White II*") and at 836 F. Supp. 1508 (D. Minn. 1993), respectively, and are reprinted in Petitioners' Appendix at 34-169 and 26-33, respectively. The decision of the District Court granting final approval to the original settlement agreement and enjoining the lawsuits of individual class

members is reported at 822 F. Supp. 1389 (D. Minn. 1993) ("*White I*") and is reprinted in Petitioners' Appendix at 170-300.

COUNTERSTATEMENT OF THE CASE

This labor dispute between NFL clubs and NFL players involved a broad challenge to the nature and structure of various player employment practices in the NFL, including the League's Plan B veteran player employment rules, the College Draft, the NFL Player Contract, and the League's preseason pay rules. At the heart of the dispute were the parties' conflicting views with regard to free agency. The players contended that they were entitled to complete free agency, under which each NFL player would be free, without restriction, to offer his services to every NFL team upon expiration of his contract. The League, on the other hand, maintained that there must be some restrictions on a veteran player's mobility so that the best NFL players would not flock to the more attractive markets or to the better quality teams, thereby disrupting competitive balance in the League and making the NFL's entertainment product less attractive to consumers.

In October 1987, several NFL players filed *Powell v. NFL*, Civ. No. 4-87-917 (D. Minn.), a mandatory class action alleging that the League's collectively bargained free agency system and various other employment practices violated the antitrust laws. The District Court in *Powell* certified a mandatory non-opt-out class action for injunctive relief and damages. *See Powell v. NFL*, 711 F. Supp. 959, 966-69 (D. Minn. 1989). In November 1989, the Eighth Circuit Court of Appeals held that the players' claim was barred by the nonstatutory labor exemption to the antitrust laws. *Powell v. NFL*, 930 F.2d 1293, 1303 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991).

Immediately following the Eighth Circuit's decision in *Powell*, the National Football League Players Association (the "NFLPA") purported to disclaim its status as the exclusive collective bargaining representative of NFL players. This step was intended to terminate the labor exemption, to put an end to collective bargaining, and to shift the labor dispute to the antitrust courts. Specifically, the NFLPA began funding and otherwise directing the filing of multiple antitrust actions against the NFL and its member clubs. Over the next three years, that campaign resulted in the filing of approxi-

mately 24 separate lawsuits, many of which were funded by the NFLPA, in fifteen federal and state courts across the country.

Among these cases was *McNeil v. NFL*, Civ. No. 4-90-476 (D. Minn.). *McNeil*, ostensibly brought by eight individual plaintiffs, challenged the legality of the League's Plan B free agency system. *McNeil* was tried to verdict in a ten-week trial. The jury found that Plan B: (1) "[had] a substantially harmful effect on competition in the relevant market for the services of professional football players"; (2) "significantly contribute[d] to competitive balance in the NFL"; and (3) was "more restrictive than reasonably necessary to achieve . . . competitive balance." *See McNeil v. NFL*, 1992-2 Trade Cas. (CCH) ¶ 69,982, at 68,769 (D. Minn. 1992) (Special Verdict Form). The jury awarded damages only to four of the eight plaintiffs in amounts significantly less than those four players had sought. *See id.*

Less than two weeks after the *McNeil* verdict, the Player Respondents filed this class action. The complaint originally sought only injunctive relief but was later amended to include a claim for antitrust damages. In October 1992, plaintiffs in *White*, as well as the plaintiffs in *McNeil*, moved for an injunction seeking to bar defendants from enforcing Plan B or imposing any other system limiting the market opportunities available to veteran NFL players whose contracts were to expire on February 1, 1993.

Against this backdrop of numerous and varied litigations, pending post-trial motions in *McNeil*, injunction motions in *McNeil* and in *White*, and the certainty of an appeal involving "complex and difficult" and "significant issues for appellate review,"[1] on January

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[1] In later approving the terms of the *White* class settlement, the District Court specifically identified several "significant issues for appellate review" that would have been raised in any appeal of the *McNeil* verdict, including: (1) the scope of the nonstatutory labor exemption; (2) the application of the rule of reason under Section 1 of the Sherman Act and, specifically, burden of proof issues related thereto; (3) the court's jury instructions regarding antitrust injury; and (4) its determination with regard to the League's "single enterprise" defense. *See White II*, 836 F. Supp. at 1467 n.25 (Pet. (continued...)

6, 1993, the parties reached an agreement in principle to settle the *White* case and a wide range of related litigation. The settlement was the result of extensive arm's-length negotiations between class counsel and the League. Pursuant to Rule 23(b)(1), the District Court conditionally certified a mandatory settlement class consisting of:

> (i) all players who have been, are now, or will be under contract to play professional football for an NFL club at any time from August 31, 1987 to the date of final approval of the settlement of this action and the determination of any appeal therefrom, and (ii) all college and other football players who, as of August 31, 1987, through the date of final approval of the settlement of this action and the determination of any appeals therefrom, have been, are now, or will be eligible to play football as a rookie for an NFL team.

See Order, *White v. NFL*, Civ. No. 4-92-906 (D. Minn. Jan. 6, 1993); Order, *White v. NFL*, Civ. No. 4-92-906 (D. Minn. Feb. 17, 1993). In the words of the District Court:

> Those mandatory class certification orders have provided a vehicle for the settlement of, among other things, all player challenges to the Plan B veteran player reservation rules, the college draft and the preseason pay rules. The settlement is the critical step toward the final resolution of the longstanding dispute between the NFL clubs and their player-employees.

822 F. Supp. at 1395 (Pet. App. at 175).

In February 1993, the parties in *White* executed a formal Stipulation and Settlement Agreement that was designed to bring an

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[1](...continued)
App. at 56-58 n.25); *see also White I*, 822 F. Supp. at 1418 (Pet. App. at 184-85).

end to this litigation and to a wide range of related cases.[2] The settlement represented a compromise on a wide array of structural issues. For the players, the settlement provided, among other things, a system of unrestricted free agency for those with at least four years of accrued service in the League. Thus, the players were able to achieve their principal and overriding objective in bringing this litigation.

At the same time, the League was able to protect to some extent its interest in competitive balance by preserving the College Draft, limiting the number of players that could become free agents in any one year, providing a League-wide cap on salaries and the amount of money to be paid to untested rookies, and limiting the number of veteran free agents that the League's "better" teams could sign.

In addition to providing prospectively for a guaranteed share of League-wide revenues to be paid to all players (which will provide players with billions of dollars), the settlement called for a $115 million payment to be distributed to class members through a settlement distribution formula approved by the District Court. 822 F. Supp. at 1421-24 (Pet. App. at 253-62).

After notice was provided to class members, 73 NFL players (out of an identifiable class of approximately 5,000) filed objections to the proposed settlement. All objectors were given a full and fair opportunity to voice their objections, including the opportunity to produce witnesses, to cross-examine witnesses offered by others, and to offer exhibits, at a formal court hearing on the fairness, reasonableness, and adequacy of the proposed settlement. Many did so. That hearing also addressed defendants' request for an

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[2] *See* Stipulation and Settlement Agreement, *White v. NFL*, No. 4-92-906 (D. Minn. Feb. 26, 1993). As part of the global settlement, the parties also settled eleven other pending federal and state court player lawsuits, all funded by the NFLPA, challenging the League's player employment rules. *See White I*, 822 F. Supp. at 1416 n.36 (Pet. App. at 237 n.36).

order enjoining all pending and future cases brought by individual class members involving the employment practices at issue in *White*.

Several weeks after the fairness hearing, the District Court issued a 115-page order overruling all objections to the proposed settlement and enjoining individual lawsuits involving similar claims by class members. *See* 822 F. Supp. at 1426, 1433-35 (Pet. App. at 260, 288-94).

In May 1993, one week after the District Court's approval of the original Stipulation and Settlement Agreement but before the court had entered a final judgment, the NFL clubs and the NFLPA entered into a new Collective Bargaining Agreement that incorporated the material terms of the settlement agreement as well as other terms and conditions of player employment. *See* 822 F. Supp. at 1435-36 (Pet. App. at 295-397). The new Collective Bargaining Agreement was ratified by approximately 96 percent of all NFL players voting. *See* 836 F. Supp. at 1467, 1483 (Pet. App. at 54, 102-03). The parties then moved to amend the Stipulation and Settlement Agreement to conform its terms to those of the Collective Bargaining Agreement.[3]

The District Court proceeded again with a formal settlement approval process. After preliminary approval and notice to all affected class members (*see* Order, *White v. NFL*, No. 4-92-906 (D. Minn. June 2, 1993)), formal objections to the amended settlement agreement were filed on behalf of 28 NFL players. This group of player-objectors was a subset of the group that had objected to the original Stipulation and Settlement Agreement.

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[3] The viability of the Collective Bargaining Agreement between the NFL clubs and players may depend on the continuing existence of the *White* settlement. If the mandatory class in *White* is not upheld on appeal and the NFL exercises its option to terminate the settlement agreement, the viability of the Collective Bargaining Agreement will be in question.

In early July 1993, the District Court held a final approval hearing to consider the amended settlement agreement. All class members and other interested parties were again afforded the opportunity to object to or otherwise express their views on the fairness, reasonableness, and adequacy of the settlement agreement, as amended.

On August 20, 1993, the District Court entered an order incorporating all of the findings set forth in its earlier settlement approval order, making certain additional findings, overruling all of the objections to the amended Stipulation and Settlement Agreement, and granting final approval thereto. *See* 836 F. Supp. at 1468, 1504 (Pet. App. at 58-59, 168-69). The court also entered a Final Consent Judgment. *See* Final Consent Judgment, *White v. NFL*, 836 F. Supp. 1508 (D. Minn. 1993) (Pet. App. at 26-33).

In the following weeks, a total of seven appeals from the Final Consent Judgment were noticed, two of which were subsequently withdrawn. The Jones Petitioners and the Dusbabek Petitioners together comprise four of the five groups of appellants below. The appellants sought reversal of the District Court's judgment on essentially the same grounds upon which they seek this Court's grant of certiorari but, as further explained below, the Court of Appeals did not reach many of those grounds in resolving the appeals.

On December 6, 1994, the Eighth Circuit unanimously affirmed the District Court's judgment. Specifically, the Court of Appeals held that: (1) the District Court's class certification under Rule 23(b)(1) and its inclusion of *these* objectors in the mandatory class constituted a proper exercise of the District Court's discretion, 41 F.3d at 407-08 (Pet. App. at 12-14); (2) the interests of the plaintiff class were adequately represented by the named plaintiffs and their counsel and were adequately protected by the settlement agreement, 41 F.3d at 408 (Pet. App. at 14-15); (3) the class members were given adequate notice of the proposed settlement and were given multiple opportunities to challenge their inclusion in the plaintiff class, 41 F.3d at 408-09 (Pet. App. at 15-16); and (4) the District Court's injunction of related actions by individual class

members was a proper exercise of its jurisdiction over the mandatory class action, 41 F.3d at 409 (Pet. App. at 16-17).

Because the only remaining objectors to the settlement were all properly subject to the District Court's personal jurisdiction, the Eighth Circuit specifically declined to reach the primary issue presented here by the objectors and left undecided by this Court's decision in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) -- "whether a trial court may certify a non-opt-out plaintiff class in an action brought primarily for injunctive relief under Fed. R. Civ. P. 23(b)(1)." 41 F.3d at 408 (Pet. App. at 14).

On January 20, 1995, the Eighth Circuit denied the objectors' petitions for rehearing and their suggestions for rehearing *en banc*. *See* Order, *Evans v. NFL*, Nos. 93-3375, et al. (8th Cir. Jan. 20, 1995) (Pet. App. at 1).

REASONS FOR DENYING THE WRIT

I. THE EIGHTH CIRCUIT EXPRESSLY DECLINED TO REACH THE PRIMARY QUESTIONS RAISED BY PETITIONERS

> Because of our view of the jurisdictional issue, we do not reach the issue raised by the objectors and left undecided by *Shutts*, namely whether a trial court may certify a non-opt-out plaintiff class in an action brought primarily for injunctive relief under Fed.R.Civ.P. 23(b)(1).

White III, 41 F.3d at 408 (Pet. App. at 14).

The Petitioners raise as their primary questions presented in this Court whether, in light of the presence of claims for monetary damages, the District Court properly certified, and maintained over Petitioners' objection, a mandatory, non-opt-out class. Because neither of these issues was decided by the Eighth Circuit, however, this Court should adhere to its usual practice and decline to consider these questions.

The Eighth Circuit's decision in this case was extremely narrow. The court held only that, in *this* case, a class action that sought predominantly injunctive relief, the District Court's inclusion of the objectors and refusal to grant them opt-out rights was a proper exercise of the District Court's discretion because all of the objectors were subject to the District Court's personal jurisdiction. *White III*, 41 F.3d at 407-08 (Pet. App. at 12-14). The Court expressly declined to decide whether, in other circumstances, a trial court may certify a non-opt-out plaintiff class in an action involving claims for money damages but brought primarily for injunctive relief.

This Court has consistently refused to review questions not considered or decided by the lower court. *See, e.g., Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-46 (1992); *Patrick v. Burget*, 486 U.S. 92, 99 n.5 (1988); *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *Ramsey v. United Mine Workers*, 401 U.S. 302, 312 (1971); *California v. Taylor*, 353 U.S. 553, 556-57 n.2 (1957); *Duignan v. United States*, 274 U.S. 195, 200 (1927). There is no reason for the Court to depart from its usual practice here. For that reason alone, the petitions should be denied.

II. THE RESULT REACHED BY THE EIGHTH CIRCUIT IS FULLY CONSISTENT WITH THIS COURT'S PRECEDENT AND WOULD NOT HAVE BEEN DIFFERENT IN OTHER CIRCUITS

Notwithstanding the Court of Appeals' jurisdictional finding and its express refusal to reach the primary issues presented in the instant petitions, Petitioners claim that the result below warrants review because it conflicts with this Court's decision in *Phillips Petroleum Co. v. Shutts*, 472 U.S 797 (1985), and the Ninth Circuit's decision in *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992), *cert. dismissed*, 114 S. Ct. 1359 (1994). Petitioners assert that these decisions stand for the proposition that, in a class action properly certified under Rule 23, all class members have an absolute right to opt out of all class actions involving claims for money damages.

Contrary to Petitioners' contentions, however, the result below is not in conflict with this Court's decision in *Shutts* or with the Ninth Circuit's decision in *Brown*. Accordingly, exercise of this Court's certiorari jurisdiction cannot be justified on that basis.

A. There Is No Conflict with this Court's Decision in *Phillips Petroleum Co. v. Shutts*

There is no conflict with this Court's decision in *Shutts* because: (1) all of the Petitioners herein were subject to the class action court's personal jurisdiction; and (2) the class' claims for injunctive relief in this case predominated over the class' claims for damages.

1. No *Shutts* Issue Is Presented Because the Objectors Were Subject to the District Court's Jurisdiction

Shutts simply did not consider whether due process requires that class members with monetary claims be given the right to opt out of a properly certified mandatory class. The issue in *Shutts* was one of personal jurisdiction -- whether a state court could acquire jurisdiction over, and therefore bind, out-of-state class plaintiffs who lacked "minimum contacts" with the forum. 472 U.S. at 806-15. The Court held that Kansas' class action rule, which afforded notice and an opt-out right to non-resident class members, provided a constitutionally sufficient basis upon which to adjudicate their claims because class members who chose not to opt out had impliedly consented to the state court's jurisdiction.[4]

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[4] *See Shutts*, 472 U.S. at 812 ("Any plaintiff may consent to jurisdiction. The essential question then, is how stringent the requirement for a showing of consent will be. We think that . . . the right to 'opt out,' [along with adequate notice,] satisfies due process.") (citations omitted); *id.* at 814 ("We conclude that the Kansas court properly asserted personal jurisdiction over the absent plaintiffs and their claims against [the defendant].").

Shutts therefore stands for the proposition that in class actions involving claims wholly or predominantly for money damages, an opportunity to "opt out" is necessary to establish consent to jurisdiction by class members over whom the court would not otherwise have jurisdiction. The opt-out reference in *Shutts* has nothing to do with, and cannot support, any unqualified due process right of class members to opt out of a class.[5]

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[5] Petitioners' own interpretation of *Shutts* has shifted over time. Some Petitioners who reside out-of-state argued below that *Shutts* guaranteed them a right to opt out, not because they were "absent" in the sense of being non-named, but because the class action court lacked a sufficient basis to exercise personal jurisdiction over them. *See, e.g.*, Objector/Appellant Byron Evans' Reply Brief (8th Cir. filed July 14, 1994), at 7 ("Evans' position throughout this matter has been that the exercise of jurisdiction over him by the Minnesota Court is inappropriate . . . . The Court cannot bind him to a settlement without affording him adequate notice, the right to opt out, and [adequate] representation within the class, *unless he has sufficient minimum contacts with Minnesota or he has consented to jurisdiction*.") (emphasis added); Reply Brief of Appellants Sean Jones, et al. (8th Cir. filed July 14, 1994), at 1 ("under the due process clause as elucidated in [*Shutts*], class certification of an action brought to resolve substantial damage claims belonging to *class members who are absent from the court's jurisdiction* cannot be granted [unless an opt-out right is afforded]") (emphasis added); *id.* at 12 ("*Given their lack of direct contacts with the forum*, Appellants had a constitutional right to opt out . . . . ") (emphasis added). After the courts below determined that Petitioners had consented to the District Court's jurisdiction, these Petitioners reversed field, and now argue in this Court that what below had been a "jurisdictional due process right" is actually an "absolute due process right."

Several courts of appeals, including the court below, have recently confirmed that the due process protections discussed in *Shutts* are unnecessary where, as in this case, the objecting class members are subject to the class action court's personal jurisdiction. There is no conflict whatsoever among the circuits on this unremarkable principle. *See, e.g., Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553, 1560 & n.8 (3d Cir.) (notice plus an opportunity to be heard and participate in the litigation "are sufficient to bind *absent class members who had sufficient minimum contacts with the forum*") (emphasis added), *cert. denied*, 115 S. Ct. 480 (1994); *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 292 (2d Cir. 1992) ("Because there is no question that the court has jurisdiction over appellants, *Shutts* is inapposite. Thus, the district court did not abuse its discretion in denying appellants the opportunity to opt out of the class.") (emphasis added) (citations omitted), *cert. dismissed*, 113 S. Ct. 1070 (1993).

Even the Ninth Circuit -- the only circuit court as to which Petitioners claim a conflict -- has consistently interpreted *Shutts* as a case that defines the process necessary to bind class members who are not otherwise subject to the class action court's personal jurisdiction. Most recently, in *Silber v. Mabon*, 18 F.3d 1449 (9th Cir. 1994), the Ninth Circuit stated:

> *Shutts* involved a multi-state class action brought in state court. . . . The issue before the court was whether a state could exercise jurisdiction over the claim of *an absent, non-resident class action plaintiff who lacked sufficient minimum contacts with the forum to support personal jurisdiction* . . . .

Id. at 1453-54 (emphasis added); *see also Besinga v. United States*, 923 F.2d 133, 136 n.6 (9th Cir. 1991) (describing *Shutts* as a case which prescribes what process is due to bind "*absent class members who are citizens of other states*"; further suggesting that *Shutts* may be of limited application because "it involved a state class action rather than a class action in federal court pursuant to Rule 23") (emphasis added); *Mitchell v. Los Angeles Unified School Dist.*, 963 F.2d 258, 262 (9th Cir.) ("In its most recent discussion of class

action 'opt out' procedures, the Supreme Court considered whether protections beyond the opportunity to opt out were constitutionally required to safeguard the rights of *a class plaintiff who was out-of-state*") (emphasis added), *cert. denied*, 113 S. Ct. 375 (1992).[6]

In this case, each of the Petitioners was specifically found to be within the jurisdictional reach of the District Court by reason of his minimum contacts with the state of Minnesota and/or because he had consented to the District Court's jurisdiction by participating extensively in the class action settlement proceedings. The District Court, expressly affirmed by the Eighth Circuit, found that the out-of-state objectors had knowingly and voluntarily submitted to the District Court's jurisdiction by: (1) personally appearing at court hearings to argue in opposition to the District Court's approval of the settlement agreement; (2) offering live testimony and/or cross-examining witnesses concerning the merits of the proposed

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[6] *See also Battle v. Liberty Nat'l Life Ins. Co.*, 770 F. Supp. 1499, 1517 n.51 (N.D. Ala. 1991) ("it is reasonable to view the particular due-process analysis in *Shutts* as limited to the situations of *the out-of-state class member*") (emphasis added), *aff'd*, 974 F.2d 1279 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 2999 (1993); *Whitson v. Heilig-Meyers Furniture, Inc.*, No. 94-PT-0309-E, 1995 U.S. Dist LEXIS 4312, *48-*49 (N.D. Ala. Feb. 9, 1995) (*Shutts* stands for the proposition that in class actions "where a plaintiff class seeks primarily monetary relief, and where a proposed settlement seeks to bind *plaintiffs who are not subject to the personal jurisdiction of the court*, due process requires that class members be given an opportunity to opt out") (emphasis added); *Waldron v. Raymark Indus., Inc.*, 124 F.R.D. 235, 238 (N.D. Ga. 1989) (under *Shutts*, court refused to certify mandatory class where class members had "insufficient contacts to allow the court to exercise personal jurisdiction over them"); *In re Jackson Lockdown/MCO Cases*, 107 F.R.D. 703, 713-14 (E.D. Mich. 1985) ("The recent Supreme Court ruling in [*Shutts*] bars a mandatory class action under state law for most claims that are wholly or predominately for monetary damages *where most members of the class reside out of state")* (emphasis added).

settlement; and (3) filing numerous papers addressing the merits of the proposed settlement, including motions to intervene, an expert affidavit setting forth the estimates of their own damages, proposed findings of fact and conclusions of law, and memoranda of law. *See White I*, 822 F. Supp. at 1432 (Pet. App. at 287-88); *White II*, 836 F. Supp. at 1501-04 (Pet. App. at 160-65); *see also White III*, 41 F.3d at 407-08 (Pet. App. at 14) ("In the present case, each of the objectors either had minimum contacts with the forum or submitted himself to the jurisdiction of the district court by appearing through counsel to contest the merits of the settlement, offering testimony, cross-examining witnesses, and filing numerous memoranda of law regarding the settlement."). That conclusion, which is factual in nature, should be accorded deference by this Court. *See, e.g., Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987); *NCAA v. Board of Regents*, 468 U.S. 85, 98 n.15 (1984); *Rodgers v. Lodge*, 458 U.S. 613, 623 (1982).

There is no question the activities described above are legally sufficient to constitute consent to jurisdiction in any context, including in the context of a mandatory class action. As the Third Circuit recently observed in *In re Real Estate Title & Settlement Services Antitrust Litigation*, 869 F.2d 760 (3d Cir.), *cert. denied*, 493 U.S. 821 (1989) -- a case upon which Petitioners placed significant reliance below -- "a party should be deemed to consent to personal jurisdiction if it actually litigates the adequacy of representation issue before the district court, or the underlying merits of the class action, because in such a case the party has shown a willingness to engage in extensive litigation in the forum." *Id.* at 771.

Because there is no question that the District Court had a proper basis upon which to exercise personal jurisdiction over Petitioners, they have no right to the procedural protections (including the opt-out right) prescribed in *Shutts*.[7]

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[7] The District Court also enjoined the objectors' individual actions concerning the same player practices at issue in *White*. In light of (continued...)

2. In Any Event, *Shutts* Would Not Require an Opt-Out Right in this Case Because it Involves Claims Predominantly for Injunctive Relief

Even if Petitioners had not been subject to the District Court's jurisdiction, there would still not be a conflict with this Court's decision in *Shutts* because this case, unlike *Shutts*, involved claims primarily for injunctive relief.

Shutts was a class action involving claims that were purely monetary in nature. *Shutts*, 472 U.S. at 799. In ruling that the Kansas state court had properly exercised jurisdiction over the *Shutts* class, the Court concluded that, in class actions seeking *predominantly money damages*, personal jurisdiction may be exercised over an absent nonresident class member only if he has been afforded individual notice and an opportunity to exclude himself from the class. *Id.* However, the Court specifically limited its holding to "those class actions which seek to bind known plaintiffs *concerning claims wholly or predominantly for money judgments.*" *Id.* at 811 n.3 (emphasis added). The Court expressly cautioned that "[w]e intimate no view concerning other types of class actions. . . ." *Id.*[8]

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[7](...continued)
the express findings of both the District Court and the Eighth Circuit that the objectors had consented to the jurisdiction of the class action court, however, objectors' challenge to the District Court's injunction raises no issue worthy of this Court's review.

[8] In dissenting from the dismissal of certiorari in *Ticor Title Ins. Co. v. Brown* last term, three members of this Court expressly noted the Court's limitation on the scope of its holding in *Shutts*. 114 S. Ct. at 1363 ("although we held in *[Shutts]* that there is a constitutional right to opt out of class actions brought in state court, *that holding was expressly 'limited to those class actions which seek to bind known plaintiffs concerning claims wholly or predominantly for money judgments'"*) (emphasis added) (O'Connor, J., joined by (continued...)

But for the District Court's findings that each Petitioner's minimum contacts or litigation conduct had subjected him to the court's jurisdiction, the instant case would be precisely the "type of class action" about which the Court in *Shutts* intimated "no view." The District Court twice made express findings that the plaintiff class' claims for structural, injunctive relief in this case predominated over its claims for damages. *See White I*, 822 F. Supp. at 1410-11 (Pet. App. at 222-24); *White II*, 836 F. Supp. at 1471-72 (Pet. App. at 70-71). The Eighth Circuit expressly affirmed these findings, characterizing this class action as one "brought primarily for injunctive relief." *White* III, 41 F.3d at 408 (Pet. App. at 14).

Because neither petition seriously challenges the lower courts' "predominance" finding,[9] the issue decided by *Shutts* is simply not presented here. Moreover, because there is no basis for disturbing the lower courts' personal jurisdiction finding, the issue reserved by *Shutts* is not presented either.

B. For the Same Reasons that No *Shutts* Issue Is Presented, the Eighth Circuit's Decision Does Not Conflict with Ninth Circuit Authority

Petitioners claim that the decision below squarely conflicts with a single decision in the Ninth Circuit, *Brown v. Ticor Title Insurance Co.*, 982 F.2d 386 (9th Cir. 1992), *cert. dismissed*, 114 S. Ct. 1359 (1994). *Brown* in no way calls into question or otherwise conflicts with the extremely narrow holding of the Eighth Circuit in this case.

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[8](...continued)
Rehnquist C.J., and Kennedy, J., dissenting from dismissal of certiorari).

[9] The Petitioners merely reiterate their view that the class action involved claims for "substantial" damages (*see* Jones Pet. at 3-4; Dusbabek Pet. at 8-9). *Shutts*, however, does not speak to "substantiality"; it speaks to "predominance."

Brown involved a collateral attack by absent non-resident class members to a mandatory class action settlement in which claims for "substantial" money damages had been involved. The district court granted defendants' motion for summary judgment, holding that the claims were barred under the doctrine of *res judicata*. *Brown*, 982 F.2d at 390.

The Ninth Circuit reversed, holding that while the absent class members were bound by the injunctive relief provided by the settlement agreement, the class members' individual claims for treble damages should proceed. *Brown*, 982 F.2d at 392. Purporting to follow this Court's decision in *Shutts* -- which the court expressly recognized "was limited to claims 'wholly or predominantly for money judgments'" -- the Ninth Circuit held that the absent class members should have been provided an opportunity to opt out of the prior class action. *Id.*[10]

The Ninth Circuit in *Brown* and the Eighth Circuit in *White* were deciding two very different issues. The Ninth Circuit was charged specifically with determining what process was due to bind absent non-resident class members who had not submitted to the jurisdiction of the class action court in a case wholly or predominantly for money damages. The Eighth Circuit, on the other hand, had the very different task of determining what process is due to bind absent class members who were subject to the class action court's jurisdiction in a case predominantly for injunctive relief.

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[10] This Court granted the *Brown* defendants' petition for certiorari on the single question of "[w]hether a federal court may refuse to enforce a prior federal class action judgment, properly certified under Rule 23, on the ground that absent class members have a constitutional due process right to opt out of any class action which asserts monetary claims on their behalf." *Ticor Title Ins. Co. v. Brown*, 114 S. Ct. 56 (1993). After oral argument, by which time "the parties had reached a settlement designed to moot the petition," the Court dismissed the writ as improvidently granted. *Ticor Title Ins. Co. v. Brown*, 114 S. Ct. 1359, 1362 (1994).

There is no conflict between the Ninth Circuit's decision in *Brown* and the Eighth Circuit's decision in *White*.

Moreover, subsequent Ninth Circuit decisions undermine Petitioners' efforts to infer from *Brown* an absolute right to opt out of all class actions properly certified under Rule 23 in which claims for monetary relief are asserted. Less than seven months after the Ninth Circuit's decision in *Brown*, another panel of that court decided *Arata v. Nu Skin International, Inc.*, No. 92-15380, 1993 U.S. App. LEXIS 21747 (9th Cir. July 14, 1993), in which the Ninth Circuit affirmed a district court's certification and approval of a Rule 23(b)(1) mandatory non-opt-out class settlement where plaintiffs' complaint had sought both injunctive relief and damages.[11] The Ninth Circuit there held:

> The central issue in this action was the defendants' conduct in implementing the Nu Skin marketing scheme. The complaint plainly seeks, *in addition to damages*, both equitable and injunctive relief. An opt-out provision might create the risk of inconsistent or varying adjudications which could establish incompatible standards of conduct for the defendants. . . . Thus, the district court did not abuse its discretion in certifying a mandatory class under Rule 23(b)(1)(A) or (B).

Id. at *6-*7 (emphasis added); *accord Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439, 464 (N.D. Cal. 1994) ("Although some of the opinion's language is a little broad and imprecise, the opinion [in *Brown*] relies entirely on [*Shutts*]. . . . '*Shutts* is limited to claims wholly or predominantly, for money damages.' Thus, it seems clear that under *Ticor* and *Shutts*, the constitutional due process requirement of notice to absent class members applies *only* to cases where monetary damages 'predominate.'") (emphasis in original) (citations omitted).

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[11] Because *Arata* is an unpublished opinion, the decision has been reprinted and included in the Appendix hereto.

In sum, subsequent cases confirm that *Brown* was not intended to grant absent class members opt-out rights in all Rule 23 class actions involving claims for monetary damages. Indeed, in the nearly three years since it was decided, not one court, either inside or outside the Ninth Circuit, has relied on *Brown* for the proposition that opt-out rights are constitutionally required in *all* class actions seeking money damages.

III. RULES 23(b)(1) AND 23(b)(2) WERE NOT INTENDED, AND HAVE NEVER BEEN CONSTRUED, TO PRECLUDE CERTIFICATION OF MANDATORY CLASSES WHERE CLAIMS FOR MONETARY RELIEF ARE INVOLVED

Federal Rule of Civil Procedure 23 has governed class actions in the federal courts for nearly 30 years. During that period, the lower federal courts have fashioned a remarkably uniform and consistent view of the proper application of Rule 23.

One principle that has become well-settled, though nowhere specifically prescribed in the Rule itself, is that class actions seeking *solely* or *predominantly* money damages should not be certified under the mandatory class certification provisions of Rule 23(b)(1) or (b)(2) unless a limited fund is at issue. By the same token, however, the lower courts have consistently held that where a class seeks predominantly injunctive relief, even though monetary claims may also be asserted, mandatory class certification under Rules 23(b)(1) and/or (b)(2) is perfectly appropriate.[12] Indeed, *every* federal circuit court to have considered the issue has upheld the use of mandatory, non-opt-out class actions under Rules 23(b)(1) and/or

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[12] As three members of this Court recognized just last term, "[t]he lower courts have consistently held that the presence of monetary damage claims does not preclude class certification under Rules 23(b)(1)(A) and (b)(2)." *Ticor Title Ins. Co. v. Brown*, 114 S. Ct. 1359, 1363 (1994) (O'Connor, J., joined by Rehnquist, C.J., and Kennedy, J., dissenting from dismissal of certiorari).

(b)(2) in cases that have involved claims for monetary relief, as long as injunctive claims predominated.[13]

Moreover, this Court has never questioned the propriety of mandatory class certification under Rules 23(b)(1) and/or (b)(2) in such cases and, in fact, expressly upheld the use of a mandatory class in a case involving monetary claims for government benefits. *Califano v. Yamasaki*, 442 U.S. 682, 701-03 (1979); *see also Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) (vacating and remanding Rule 23(b)(2) mandatory class action for employment discrimination *because lower court had failed to award monetary backpay relief*) (emphasis added).[14]

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[13] *See, e.g., Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 29, 31-33 (1st Cir. 1991); *Robertson v. NBA*, 556 F.2d 682, 685 (2d Cir. 1977); *Walsh v. Great Atl. & Pac. Tea Co.*, 726 F.2d 956, 962-66 (3d Cir. 1983); *Robinson v. Lorillard Corp.*, 444 F.2d 791, 801-02 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971); *King v. South Cent. Bell Tel. & Tel. Co.*, 790 F.2d 524, 528-31 (6th Cir. 1986); *Williams v. Burlington N., Inc.*, 832 F.2d 100, 103-04 (7th Cir. 1987), *cert. denied*, 485 U.S. 991 (1988); *Reynolds v. NFL*, 584 F.2d 280, 283-85 (8th Cir. 1978); *Probe v. State Teachers' Retirement Sys.*, 780 F.2d 776, 780 (9th Cir.), *cert. denied*, 476 U.S. 1170 (1986); *Rich v. Martin Marietta Corp.*, 522 F.2d 333, 339-42 (10th Cir. 1975); *Howard v. McLucas*, 782 F.2d 956, 961 (11th Cir. 1986); *Larionoff v. United States*, 533 F.2d 1167, 1181-82 n.36 (D.C. Cir. 1976), *aff'd*, 431 U.S. 864 (1977).

[14] Petitioners' repeated intimations that the Ninth Circuit has demonstrated a divergent or more "enlightened" view regarding the proper utilization of mandatory class actions is wrong. The Ninth Circuit has routinely certified mandatory classes despite the existence of claims for monetary relief. *See, e.g., Arata v. Nu Skin Int'l, Inc.*, No. 92-15380, 1993 U.S. App. LEXIS 21747 (9th Cir. July 14, 1993) (reprinted in Appendix hereto); *Probe v. State Teachers' Retirement Sys.*, 780 F.2d 776 (9th Cir.), *cert. denied*, 476 U.S. 1170 (1986); *Dosier v. Miami Valley Broadcasting Corp.*, 656 F.2d 1295, 1299 (9th Cir. 1981); *Saunders v. Naval Air*

(continued...)

There is nothing in the text of Rule 23, or in the Advisory Committee's Notes that accompanied its adoption, to suggest that any other interpretation of Rule 23 was intended or is even reasonable. To the contrary, the Advisory Committee's Notes confirm that mandatory class certification is appropriate in cases predominantly involving claims for injunctive relief but also having significant damage claims.

The Advisory Committee provides as examples of appropriate cases for treatment under Rule 23(b)(1) a number of causes of action that would typically include claims for monetary relief: actions for damages against a common or limited fund, actions by shareholders to compel the declaration of a dividend, and litigations instituted by security holders or other beneficiaries of a trust against the trustee for breaches of his fiduciary duties. *See Amendments to Rules of Civil Procedure, Advisory Committee's Notes to Rule 23,* 39 F.R.D. 69, 100-01 (1966) (hereinafter "*Advisory Notes*").[15] Similarly, the fact that the Advisory Committee excludes from certification under (b)(2) claims "exclusively or predominantly [for] money damages" necessarily implies that claims for money damages

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[14](...continued)
Rework Facility, 608 F.2d 1308, 1312 (9th Cir. 1979); *EEOC v. General Tel. Co.* , 599 F.2d 322, 334 (9th Cir. 1979), *aff'd on other grounds*, 446 U.S. 318 (1980); *Elliott v. Weinberger*, 564 F.2d 1219, 1228 (9th Cir. 1977), *aff'd in relevant part sub nom. Califano v. Yamasaki*, 442 U.S. 682 (1979).

[15] Among the cases cited by the Advisory Committee as examples of cases that typically would be eligible for mandatory (b)(1) certification were: *Zahn v. Transamerica Corp.*, 162 F.2d 36 (3d Cir. 1947) (securities class action brought by former minority stockholder against Delaware parent corporation to recover class damages for fraud); *Edgerton v. Armour & Co.*, 94 F. Supp. 549 (S.D. Cal. 1950) (class action brought by former stockholders of dissolved corporation for sums due on contract); *York v. Guaranty Trust Co.*, 143 F.2d 503 (2d Cir. 1944) (class action brought by beneficiary of trust against trustee to recover damages for breach of fiduciary duties), *rev'd on other grounds*, 326 U.S. 99 (1945).

that do not predominate may be certified. *Advisory Notes*, 39 F.R.D. at 102. Such interpretation is confirmed by the types of actions the Advisory Committee lists as illustrative cases for mandatory class certification under Rule 23 (b)(2): civil rights cases, antitrust cases for illegal price discrimination, and actions alleging patent infringement -- all of which could, and usually do, include claims for money damages. *See id.*

In sum, the consistent treatment of mandatory class actions brought primarily for injunctive relief, but also involving damage claims, has established a sound rule of law that need not be reviewed by this Court. It can fairly be said that "[Rule 23(b)(1)'s] validation is its pedigree." *Burnham v. Superior Court*, 495 U.S. 604, 621 (1990) (Scalia, J., joined by Rehnquist, C.J., and Kennedy, J., concurring).

CONCLUSION

For all of the foregoing reasons, the petitions should be denied.

Respectfully submitted,

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PATRICIA ARATA, on behalf of herself and all others similarly situated, Plaintiff-Appellee, CHARLES C. BROWN, Plaintiff-Appellant, v. NU SKIN INTERNATIONAL, INC., a Utah corporation; CLARA McDERMOTT, Defendants-Appellees.

ARATA v. NU SKIN INTL., INC.

No. 92-15380

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

1993 U.S. App. LEXIS 21747

July 14, 1993 **, Submitted, San Francisco, California

**The panel unanimously finds this case suitable for submission on the record and briefs and without oral argument. Fed. R. App. P. 34(a), Ninth Circuit R. 34-4.

August 24, 1993, Filed

NOTICE: [*1] THIS DISPOSITION IS NOT APPROPRIATE FOR PUBLICATION AND MAY NOT BE CITED TO OR BY THE COURTS OF THIS CIRCUIT EXCEPT AS PROVIDED BY THE 9TH CIR. R. 36-3.

SUBSEQUENT HISTORY: Reported in Table Case Format at: *5 F.3d 534, 1993 U.S. App. LEXIS 30282.*

PRIOR HISTORY: Appeal from the United States District Court for the Northern District of California. CV-91-02811-FMS. Fern M. Smith, District Judge, Presiding.

DISPOSITION: Affirmed

JUDGES: Before: WALLACE, Chief Judge; D.W. NELSON and O'SCANNLAIN, Circuit Judges.

OPINION: MEMORANDUM

Nu Skin is a self-styled "multi-level marketing program," in which distributors, lured by the promise of big money earned through little effort, purchase cosmetic and hygiene products in an effort to ascend a ladder of marketing positions. It is, in other words, a pyramid scheme. Distributors' earnings depend on product sales and commissions for recruiting new participants. To remain in the distribution ladder, and thus earn commissions from "downline" distributors, distributors must maintain a volume of wholesale purchases of Nu Skin products. Patricia Arata, a Nu Skin distributor, filed a class action against Nu Skin International, Inc., Blake M. Roney, Keith Halls, Clara McDermott, and Steven J. Lund (collectively, "defendants"), alleging that the defendants, in promoting and selling Nu Skin [*2] distributorships, violated federal securities laws and the Racketeer Influenced and Corrupt Organizations Act. She also asserts a number of state law claims.

On November 26, 1991, the district court certified a settlement class and granted preliminary approval of a proposed settlement agreement. The settlement class includes more than 835,000 current and former Nu Skin distributors. On January 20, 1992, the appellant, Charles Brown, submitted his objections to the proposed settlement agreement. On January 31, 1992, after a hearing to consider objections, the district court granted final approval to the settlement and awarded fees and costs to plaintiff's counsel.

Brown timely filed a notice of appeal on February 28, 1992. He contends that the district court erred in certifying a mandatory settlement class and, in approving the settlement and the award of attorneys fees, failed to protect the interests of absent

class members. We have jurisdiction pursuant to *28 U.S.C. § 1291*. We affirm.

I

The defendants have moved to dismiss Brown's appeal, contending that he lacks standing. The plaintiffs-appellees join the defendants' motion.

The settlement class [*3] certified by the district court is defined as "all persons who are or were Independent Distributors in the Nu Skin International, Inc., network marketing program within the past three years and who incurred a net economic loss." The defendants concede that Brown signed a distributorship agreement and charged $ 285.99 worth of Nu Skin products. The defendants allege, however, that Brown never picked up the products he charged. He claims that he did. The facts alleged by Brown put him within the definition of a class member. He received notice and filed an objection. As a member of the class, his legal rights are affected by the settlement. He therefore has standing to appeal. *Marshal v. Holiday Magic, Inc., 550 F.2d 1173, 1176 (9th Cir. 1977)*; see also Newburg on Class Actions, § 16.01, at 16-6 (3d ed. 1992).

II

Brown contends that the district court abused its discretion in certifying the class because all the requirements of Rule 23(a) have not been met. In particular, he contends that there are not questions common to the class and that the claims of the representative plaintiff are not typical of the claims of the class. See Fed. R. Civ. [*4] P. 23(a)(2) & (3). We review the district court's certification of a class for an abuse of discretion. *Six Mexican Workers v. Arizona Citrus Growers, 904 F.2d 1301, 1304 (9th Cir. 1990)*.

A

It appears both from the complaint and from the record that there are common questions of law and fact. The complaint alleges that, to entice investors, the defendants created standardized, scripted telephone solicitations, promotional seminars, inspirational audio and video tapes, and written materials, all containing material misrepresentations and omissions. Declarations and exhibits in the record support the allegation that the defendants intended these uniform presentations to be used by others to recruit new distributors. Thus, the issue of the defendants' conduct in making misrepresentations and withholding information is common to all members of the class. The district court therefore did not abuse its discretion in finding the requisite commonality. See *Cameron v. E.M. Adams & Co., 547 F.2d 473, 477 (9th Cir. 1976); Blackie v. Barrack, 524 F.2d 891, 902 (9th Cir. 1975)* (class of purchasers allegedly [*5] defrauded over a period of time by similar misrepresentations is united by a common interest in determining whether a defendant's course of conduct is in its broad outlines actionable), cert. denied, *429 U.S. 816 (1976); In re Activision Securities Litigation, 621 F. Supp. 415, 428 (N.D. Cal. 1985); Bresson v. Thomson McKinnon Securities, Inc., 118 F.R.D. 339, 342 (S.D.N.Y. 1988)*; cf. *Soper v. Valone, 110 F.R.D. 8, 9 (W.D.N.Y. 1985)* (common factual and legal issues did not predominate where similar oral presentations were utilized to garner investments in different entities).

B

Brown next contends that the representative plaintiff's claims are not typical of those of the class "for the simple reason that there was only one named plaintiff in the case and yet there are at least two different types of claimants or recoveries spelled out in the Refund Program of the Settlement Agreement." He argues that any distinction between types of recoveries provided for in the settlement agreement creates a conflict of interest such

that the district court abused its discretion [*6] in finding sufficient typicality. Brown's contention is without merit.

The class is defined as Nu Skin distributors who incurred net economic loss. From allegations in the complaint as well as in her declaration, Arata's claims appear to be typical of the claims of the class. Thus, the explicit requirement of Rule 23(a)(3) has been met. Brown has failed to persuade us that any distinctions drawn in the structure of the refund program are significant. See *Blackie, 524 F.2d at 909-10*; see also *Gates v. Dalton, 67 F.R.D. 621, 630 (E.D.N.Y. 1975)*. Indeed, Brown's arguments in this regard go more to the reasonableness of the settlement than to the typicality of the class representative.

III

Brown contends that district court abused its discretion by certifying a mandatory class under Rule 23(b). This contention is also without merit.

The central issue in this action was the defendants' conduct in implementing the Nu Skin marketing scheme. The complaint plainly seeks, in addition to damages, both equitable and injunctive relief. An opt-out provision might create a risk of inconsistent or varying adjudications which could establish [*7] incompatible standards of conduct for the defendants. Moreover, the settlement agreement establishes a comprehensive equitable remedy -- an ongoing refund program with no limit as to the amount to be refunded. Class members have a common interest in the preservation and equitable distribution of the refund program. Thus, the district court did not abuse its discretion in certifying a mandatory class under Rule 23(b)(1) (A) or (B). Cf. *McDonnell Douglas v. United States District Court, 523 F.2d 1083, 1086 (9th Cir. 1975)*, cert. denied, *425 U.S. 911 (1976)*.

IV

Brown makes a number of arguments challenging the certification of a defendant class. There is, however, no indication in the record that the district court certified a defendant class.

V

Finally, Brown challenges the fairness of the settlement agreement.

In this case, in accordance with the procedures outlined in the Manual for Complex Litigation 2d, the district court evaluated the proposed settlement and granted preliminary approval. See MCL 2d, § 30.44, at 241. Then, before granting final approval to the settlement agreement, the court solicited comments [*8] and held a hearing. See id. In its final order, the court indicated that it had considered the presentations of counsel and the relative merits of the claims and the defenses, the complexity of the case, the likely duration and expense of the trial, and the risks attendant to both trial and appeal and had concluded that the proposed settlement was fair, reasonable, and adequate under the circumstances. Our review of that conclusion is a limited one. *Class Plaintiffs v. City of Seattle, 955 F.2d 1268, 1276 (1992)*, cert. denied, *113 S. Ct. 408 (1992)*. "We are not permitted to substitute our notions of fairness for those of the district judge and the parties to the agreement." Id. (quotations omitted). Rather, we ask only whether the settlement is "fundamentally fair, adequate, and reasonable." Id. (quotations omitted).

We will not dwell long on the majority of Brown's arguments. Most rest almost entirely on supposition. For example, he speculates that the short time frame between the filing of the suit and proposal of settlement precluded any serious negotiation and suggests collusion. He also speculates that counsel [*9] failed to undertake discovery and he complains that the

settlement is preferential to the defendants because it allows them to avoid defending multiple suits. Simply put, he has not made "a strong showing that the district court's decision was a clear abuse of discretion." *Id.* (quotations omitted). Brown's two strongest challenges are to the structure of the refund program and to the attorneys' fees provision. We briefly consider those two claims.

A

The settlement agreement is weighted in favor of those who return products, providing them with a ninety percent refund, while those who can prove only economic loss receive a ten percent refund. Moreover, the total amount of refunds paid to those without products to return cannot exceed more than thirty percent of the entire amount refunded. Brown contends this distinction is arbitrary and capricious. However, the refund program appears to be responsive to the gravamen of the complaint. As Brown recognizes, the defendants' scheme required distributors to "inventory load." He does not explain why it was arbitrary for the settlement program to focus on remedying that concrete injury. Nor does he explain in what way the refund program [*10] falls outside of the range of reasonableness.

B

The settlement provides for an award of attorneys' fees equal to ten percent of the amount refunded, with $ 800,000 of those fees to be paid on a non-refundable basis from a reserve account established by the defendants. Relying upon *Jamison v. Butcher & Sherrard, 68 F.R.D. 479, 484 (E.D. Pa. 1975)*, Brown complains that the $ 800,000 payment creates the impression that the defendants have bought themselves out of the lawsuit. Jamison, however, is clearly distinguishable. In that case, the district court did not approve the settlement because the class received nothing beyond that to which it was already entitled under a previous settlement with SEC. *Id. at 483.* Under the circumstances, the court noted that a direct payment of attorneys' fees left the impression that the defendants were buying themselves

out of the lawsuit. *Id. at 483-84.* Here, in contrast, the settlement provides a substantial remedy for the class. Brown also suggests that detailed time records should have been submitted in support of the fee award. However, under [*11] the settlement agreement, attorneys' fees are to be calculated as a percentage of the total recovery. See *Six Mexican Workers, 904 F.2d at 1311*; see also *In re Activision Securities Litigation, 723 F. Supp. 1373, 1370-79 (N.D. Cal. 1989)* (in class action common fund or "equitable" cases the better practice is to set a percentage fee and, absent extraordinary circumstances, the rate should be set at thirty percent). Thus, it is not clear what purpose submission of time records would have served.

VI

In short, Brown has failed to show that the district court abused its discretion in certifying a mandatory settlement class or in approving the settlement agreement.

AFFIRMED